

THE
R E P O R T S

OF THE MOST LEARNED

SIR *EDMUND SAUNDERS*, KNT.

VOL. II.—PART II.

THE
R E P O R T S

OF THE MOST LEARNED

SIR *EDMUND SAUNDERS*, KNT.

LATE LORD CHIEF JUSTICE OF THE KING'S BENCH,

OF SEVERAL

PLEADINGS AND CASES

IN THE

Court of King's Bench,

IN THE TIME OF THE REIGN OF

HIS MOST EXCELLENT MAJESTY KING CHARLES THE SECOND.

WITH THREE TABLES :

The First, of the NAMES of the CASES ; the Second, of the Matters contained in the PLEADINGS ; and the Third, of the Principal Matters contained in the CASES.

THE FOURTH EDITION.

WITH NOTES AND REFERENCES TO THE PLEADINGS AND CASES,

By JOHN WILLIAMS,

SERJEANT AT LAW.

IN TWO VOLUMES.

VOL. II.—PART II.

L O N D O N :

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1809.

AN EXACT TABLE

OF THE

PRINCIPAL MATTERS

IN THE

PLEADINGS TO THE SECOND VOLUME OF THE REPORTS

OF THE MOST REVEREND JUDGE

Sir EDMUND SAUNDERS, KNIGHT, &c.

Note, That in all Places where you find this Mark † the Pleading is ill or doubtful.

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A man devises a yearly rent out of lands to a woman for her life; but if she shall be married, then his executor shall pay her 100l. and the said rent shall cease and return to the said executor; there, if she marries in the devisor's life-time, she shall never have the rent; but if she marries after his death, she shall have the rent until the 100l. are paid. 198, 199, 200

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A man deviseth the inheritance of his land to his wife for her life, and afterwards to the son which she shall have, if she causes him to be called by his Christian and surname, *Sampson Shelton*; and if he dies under

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A devise to 1st son of lands in A. to 2d son of lands in B. and 3d son of lands in C. and that if any of them died the others surviving should be his heir; the devisor dieth, and the reversion descends to his first son; adjudged, that his estate for life was merged in the reversion. 386

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Anno 1 R. 2. cap. 12. ESCAPE.

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The mistakes, *reddat & messagium*, where it should be *reddant & mesuagium*, as a superfluous &c. in a writ of *quod ei desorreat*, are amendable by the statutes of 8 H. 6. c. 12. and 15. 38, 39, 42

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Anno 27 H. 8. cap. 26. WALES.

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Anno 32 H. 8. cap. 30. JEOFAILS.

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Annis 34 & 35 H. 8. c. 26. WALES.

This statute provides for the trial of a foreign voucher made before the justices of *Wales*, in any county of *Wales*, but not in any county of *England*. 41

If a foreign voucher before the justices of *Wales* be in an *English* county, the justices of *Wales* may proceed, notwithstanding such foreign voucher. *ibid.*

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mence on a *Wednesday*, notwithstanding the statute appoints, that it shall be kept and continued for six days; for the intervention of *Sunday* does not discontinue the sessions, but it may be adjourned to *Monday*. 42
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Anno 27 Eliz. cap. 5. DEMURRER.

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Anno 21 Jac. cap. 13. JEOFAILS.

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DE

Term. Sancti Mich.

Anno Regni Regis, Car. II. 22.

Hambleton *versus* Veere.

Case 30.

Trin. 21 Car. 2. Regis. Ret. 1750.

ACTION on the case; the plaintiff declares that whereas one *Henry Veere*, on the 29th of September in the 16th year of the reign of the king at, &c. was retained in the service of the plaintiff, as his apprentice, for the term of nine years then next following, to serve in the art of a bricklayer, and the said *Henry Veere* on that occasion had been diligently occupied and employed in the said service for the space of five years, the said defendant well knowing the premises, but contriving craftily and subtilly to deceive and defraud the plaintiff of the service of his said servant; and of all profit and advantage which he might have by means of his said service, on the last day of October in the 21st year of the reign of the now king at, &c. procured and seduced the said *Henry Veere* then the servant of the said *Clement* (the plaintiff) to depart from the said service of the said plaintiff, by means of which said procuring and seduction afterwards, to wit, on the 1st day of November in the year aforesaid at, &c. the said *Henry*, without the leave and against the will of the said *Clement*, departed from the said service of the said *Clement* (the plaintiff), whereby he the said (plaintiff) wholly lost and was deprived of all the profit, gains and advantage, which he might have received by means of the service of the said servant for all the residue of the said term to come, to the damage of the plaintiff of 100l. wherefore he brought this

S. C. 2 Kcb.
693. 691.
Sir T. Raym.
200.
1 Lev. 299.
S.C. cited 5 Mod.
286. 287.
The plaintiff declared for procuring his apprentice to depart from his service, and for the loss of his service, for the whole residue of the term of his apprenticeship, and the jury assessed damages generally, judgment was arrested, because it appeared that the term was not expired.

HAMBLE-
TON v.
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action; and on the general issue of not-guilty pleaded, a verdict was found for the plaintiff at the assizes in *Essex*, and damages assessed with costs of suit.

And now it was moved in arrest of judgment by the defendant, that the plaintiff has declared, and has a verdict, for greater damages than by his own shewing he ought to recover; for it appears that *Henry Veere* became the plaintiff's apprentice on the 29th *September* in the 16th year of the reign of the king, and that the apprentice was to serve the plaintiff for the term of nine years, which are not yet expired; and the plaintiff declares that the defendant has procured the apprentice to depart out of the plaintiff's service, and that he so departed on the 1st day of *November* in the 21st year, whereby the plaintiff lost the profit of his service for all the residue of the said term; so that here the plaintiff not only declares for damages for causing the apprentice to depart out of the plaintiff's service, but also for damages by the loss of the profit of the service for all the rest of the term, and therefore the damages are assessed as well for the one as for the other. And intire damages being assessed, the plaintiff ought not to have judgment, for it appears that the residue of the term of apprenticeship is not yet determined; and for that part of the term which is to come the plaintiff ought not to recover any damages, because the apprentice may return to his master, and so the plaintiff may have the service of his apprentice for the residue of the term yet to come, therefore he ought not to have damages for the loss of it. And if the apprentice will not voluntarily return, yet the plaintiff may compel him by law to serve him for the residue of the term, for the bringing of this action does not discharge the apprentice from his apprenticeship; therefore if the plaintiff should recover the damages in this action, he will be twice satisfied for the same thing, for he will have both the service, and damages for the loss of it also, which will be absurd. So the apprentice may die within the term, and therefore for the residue after his death the plaintiff ought not to recover any damages, because the death of the apprentice happens by the act of God; and for these reasons the plaintiff ought not to recover damages for the loss of the service of his apprentice

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VEERE.

apprentice for the time to come, but should have only declared in this action for the loss of service from the time of the departure until the exhibiting of the plaintiff's bill, and no longer; but here the plaintiff having declared for the loss of the service of his apprentice for all the residue of the term, as well for the time to come as for the time past, and intire damages being assessed, it was prayed that judgment should be arrested. *

And afterwards it was moved for the plaintiff, that the damages assessed by the jury were assessed only for the wrong by the defendant in procuring the apprentice to depart out of the service, and not for the loss of service; but if they should be intended for the loss of service also, yet, it was said, that it cannot be intended that the damages are given for the loss of service in future, but only for the loss of service before the exhibiting of the bill, for of this the jury had sufficient cognisance, but of the loss of service in future the jury could not by any possibility take any cognisance, wherefore it ought necessarily to be intended that the damages are assessed for the loss of service for the time past; therefore the plaintiff ought to recover damages assessed; wherefore judgment was prayed for the plaintiff.

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But *tota curia é contra*; for as this declaration is framed, the plaintiff intended to recover damages for *all* the term, as well for the time to come, as for the time past, and the jury have assessed them accordingly; for which damages so assessed the plaintiff ought not to have judgment for the reasons above offered by the defendant. And although it was an error in the jury, yet the plaintiff was the occasion of it; for the jury finding the issue for the plaintiff, ought to assess the damages as the plaintiff has alleged them in his declaration; and here it plainly appears that the plaintiff has alleged his damages to be as well for the loss of service for all the residue of the term, as for the procuring of the departure, and for both those things the jury have assessed the damages according to the plaintiff's declaration. And as to what has been said, that it shall not be intended that the jury have given damages for the time to come, but only for the time

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past, the court said that it is now to be intended that the damages are assessed according to the declaration; but if it should be intended otherwise, yet it does not appear but that the jury have assessed damages for the loss of service up to the time of giving the verdict, and therefore have likewise given greater damages than the plaintiff ought to recover; for he ought to have recovered damages for the loss of service until the exhibiting of the bill only and no more; but it is not ascertained by the verdict for what time the damages are assessed unless for all the residue of the term, for they are assessed generally; and if they should not be intended for all the residue of the term, for what time shall they be intended? For a month, or two months, or until the exhibiting of the bill, or until the giving of the verdict? Certainly no one can say; and therefore the assessing of the damages is either bad, if they are assessed for all the residue of the term, or uncertain, if they are assessed for any other time; wherefore judgment was arrested by the court (1). *Kelynge* chief justice being absent through indisposition.

(1) But in covenant against an apprentice for going away out of his service before his time, whereby the plaintiff lost his service *for the said term*, which was not then expired, the plaintiff demurred: and by *Twysden* justice, though it has been adjudged to be naught after verdict, yet being on demurrer it may be helped; for the plaintiff may take damages for the *departure* from the service only, and not for the loss of service during the term, and then it will be well enough 1 Mod. 271. *Horn v. Chandler*. So where the plaintiff intitled himself to a mill by a lease in Jac. 1. and assigned a breach for not grinding from 2 Jac. 1. to the 12 Jac. 1. and the jury found a verdict for the plaintiff, and gave general damages; the court arrested the judgment, because the plaintiff's lease was

made only in the 11 Jac. 1., and the jury have given damages for not grinding from the 2 Jac. 1. before his title accrued Moor 877. *Harbin v. Grene*. Hob. 189. S. C. So where in an action on the case, the declaration stated that the plaintiff on the 2d of July was possessed of a meadow, and the defendant on the 3d of August built a mill, and caused the meadow to be overflown, whereby the plaintiff lost all the use and profit thereof from the said 2d day of July until the exhibiting of the bill; there was a verdict for the plaintiff and intire damages: but judgment was arrested, for though an erection on the 3d day of August might make the plaintiff lose a particular gain or profit from the 2d day of July, as if he had laid in the meadow for hay; yet by an erection on the 3d day of August he could

could never lose the *whole use* and profit from the 2d day of *July*; therefore he had recovered more damages than he ought, and the case was not to be distinguished from *Moor* 887. Hob. 189. 2 Salk. 653 *Prince v. Molt*. S. C. Carth. 386. Comb 442 1 Ld. Raym. 248. 12 Mod 131. Also where an action was brought for taking away the plaintiff's wife, and keeping her from him until such a day, *which was sometime after the exhibiting of the bill*, after verdict for the plaintiff, judgment was arrested, because the jury must be intended to have given damages *for the whole time* mentioned in the declaration. 1 Vent. 103. *Ward v. Rich*. So in trespass and false imprisonment, the plaintiff declared that the defendant imprisoned him the 1st of *October* 9 W. 3. and detained him in prison for four months, and after verdict for the plaintiff, and intire damages, judgment was arrested, because the declaration being of *Michaelmas* term 9 W. 3. and the damages being intire, and given for the imprisonment of four months from the 1st of *October*, it appeared that the damages were given for imprisonment after the action was commenced. 1 Ld. Raym 329. *Brasfield v. Lee*. See also Cro. Jac. 618. *Hanbury v. Ireland*. S. P. And a judgment in the common pleas was reversed in the king's bench, because the jury on the writ of inquiry had given damages for necessities provided after the action commenced, and to a time after the writ of inquiry was executed. 2 Ld. Raym. 1382. *Baker v. Bache*.

It is also a settled rule, that where there are several counts, and a verdict is entered generally on all the counts,

and intire damages are given, and one count is bad, it is fatal, and judgment shall be arrested, Doug. 730. *Grant v. Affle*. 3d edit and it shall be arrested *in toto*, and no *venire de novo* awarded. 1 Term Rep 151. *Trevor v. Wall*. 3 Term Rep. 425. *Hancock v. Haywood*, per Buller J 6 Term Rep. 91. *Holt v. Scholefield*. However, where a general verdict has been taken, and *evidence been given only on the good counts*, the court has permitted the verdict to be amended by the judge's notes. Doug. 376. *Edowes v. Hopkins*. 3d edit. So where it appears by the judges notes that the jury calculated the damages on evidence applicable to the good counts only, the court will amend the verdict by entering it on those counts, though evidence was given applicable to the bad counts also. 1 Bos. & Pull. 379. *Williams v. Breckon*. See 1 H. Black. 78. *Spencer v. Coter*.

On the other hand, where the plaintiff declared for the battery of his servant on the 19th *January*, &c. by reason whereof he lost his service &c. for a long time, *videlicet*, for the space of six months then next following, after verdict for the plaintiff and entire damages assessed, it was objected that the original bore *teste* before the end of the six months; but the court gave judgment for the plaintiff, because the *videlicet* was more than was necessary. 1 Hob 284. *Hunt v. Lawring*. See also All. 22, 23. *Sims v. Gregory*, S. P. So in an action on the case for diverting a water-course 1 Jan. 1 Geo. and continuing it to *March* 1715, whereby the plaintiff lost the benefit of the water-course *from thence till April then next following*; and after verdict for the plaintiff it was moved

moved in arrest of judgment, that entire damages were given, when part of the time was to come at the trial; for as the plaintiff alleged continuance till *March 1715* which was not passed, and the damages were given for the time till *April next following*, that is, till *April next*, and so the jury in giving damages had consideration of a time not passed at the time of their verdict; and it was likened to this case of *Hambleton v. Veere*. 2 Saund. 169 *Sed non allocatur*; for *per curiam*, the time mentioned *March 1715*, not being then incurred, it was impossible; for at the time of the action it was not possible that the diversion of the water-course had continued till a time then not come, and therefore when the plaintiff alleged that he lost the benefit of the water-course till *April next following*, that was also impossible, and therefore the jury could not have had any consideration of it. Com. Rep. 231, 232. *Talden v. Hubbard*. So where the declaration was of *Michaelmas* term of an assault on the 18th of *October*, and an imprisonment from thence for 25 weeks; and after a verdict for the plaintiff, it was moved in arrest of judgment, that the action was brought too soon, and it appeared damages had been given for an imprisonment long after the action was depending, and 2 Saund. 169. 2 Salk. 662. Cro. Jac. 618. 1 Vent. 103. Hob. 189. Carth. 386. were cited in support of the objection. But for the plaintiff it was argued, that the *continuando* in this case was laid under a *scilicet*, and therefore according to All. 22. and Hob. 171. 284. it will not vitiate what is properly laid in time, and that this differs from all the cases where the time is *affirmatively* laid.

And of this opinion was the court, and the plaintiff had judgment 2 Str. 1095. *Webb v. Turner*. Andr. 250. S. C. See also 3 Lev. 246. *Hart v. Barton*. Ibid. 346. **Carter v. Canthorpe*. S. C. Carth. 261. 4 Mod. 152. Carth. 20. *Bridges v. Horner*. Comb. 193. S. C.

These cases seem to establish this principle, that where it is positively and expressly averred in the declaration, that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be intitled to his judgment.

A distinction has been taken, that when a new action may be brought, and satisfaction obtained, for any duty or demand which hath arisen since the commencement of the depending suit, that duty or demand shall not be included in the judgment in the former action, as in covenant for non-payment of rent, or of an annuity payable at different times, the plaintiff may bring a new action *toties quoties*, as often as the respective sums become due and payable. So in trespass, and in tort, new actions may be brought as often as new injuries and wrongs are repeated; and therefore damages shall be assigned only up to the time of the wrong complained of. But where a man brings an action of assumpsit for principal and interest, upon a contract

contract obliging the defendant to pay such principal money *with interest* from such a time ; he complains of the non-payment of both ; the interest is an accessory to the principal, and he cannot bring a new action for any interest grown due between the commencement of his action, and the judgment in it, and therefore both shall be included in the judgment. 2 Burr. 1087. *Robinson v. Bland*.

There is another class of cases on this head respecting *actions for words* ; with regard to which it is laid down, that if an action be brought for speaking words *all at one time*, that is, all in one count, and there is a verdict for the plaintiff, though some of the words will not maintain the action, yet if any of the words will, the damages may be given intirely ; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation. 1 Roll Abr. 576. (F) pl. 1. Moor. 142. 143. *Broughton's case*. Ibid. 708. *Berkley v. Earl of Pembroke* Cro Eliz 328. *Brooke v. Clarke*. Ibid. 788. *Thaxbie v. Smith*. 1 Bull. 37. *Lyner v. Stan-*

wel. But if the action be brought for several words spoken *at several times*, and the action will not lie for the words spoken at one time, but will lie for the words spoken at another, and a verdict be found for all the words and intire damages given, it is not good, and judgment will be arrested. 1 Roll. Abr. 576. (F.) pl. 2. Cro. Eliz. 329. *Brooke v. Clarke per Popham* C. J. Cro. Car. 236, 237. *Jaxon v. Tanner* Ibid. 327, 328. *Penson v. Gooday*. Therefore if the declaration consists of *several counts*, and all the words in some of them are not actionable, and there is not any special damage laid, or if laid, not found, and a *general* verdict is taken for the plaintiff, (except as to the special damage, if any laid, and that is found for the defendant) the judgment will be erroneous, and may be avoided by motion in arrest of judgment, or reversed on error brought. 2 Bac. Abr. 7. But it is said to be the rule of the common pleas to award a *venire de novo* in such case on payment of costs, that the plaintiff may sever his damages. Barnes, 478. *Anger v. Wilkins*. Ibid. 480. *Smith v. Haward*.

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Case 31.

Yard *versus* Ford.

Mich. 22 Car. II. Regis.

ACTION on the case ; the plaintiff declares that whereas he, on the 20th *October* in the 15th year of the reign of the now king, and long before, was, and yet is, seised of and in the town of *Neruton Abbot* with the appurtenances in the county of *Devon* in his demesne as of fee, and of a certain ancient market holden and to be holden within the said town

S. C. 1 Lev. 296.

Sir T. Raym.

195.

1 Mod. 69.

1 Vent. 98.

2 Keb. 689.

706.

If a new market be erected without patent &c

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town near to an ancient market, it may be a nuisance, though holden on different days; and therefore in an action on the case for erecting such new market to the nuisance of an ancient market, if the jury find for the plaintiff, the court will not doubt of the nuisance, though it appears they are holden on different days.

every *Wednesday* in every week as of fee and right, and that the plaintiff had and ought to have the said market within the said town for all goods and merchandises then and there bought and sold, together with toll, stallage, piccage, and all other profits, advantages and emoluments whatsoever incident, belonging or appertaining to the said market; (1) yet the said defendant contriving and intending, &c. on the said 20th day of *October* in the 15th year aforesaid, without any lawful warrant, or authority, at the parish of *Asfburton* in the county aforesaid, to wit, within the town of *Asfburton* there, near adjoining to the said town of *Newton Abbot*, that is to say, within seven miles of the said town of *Newton Abbot*, levied a certain new market held every *Tuesday* in every week throughout the year, and continued the market so newly levied from the said 20th of *October* in the 15th year aforesaid until the day of exhibiting the plaintiff's bill, whereby a great quantity of yarn, and of other goods and merchandises, was during all the time aforesaid sold in the said market so newly erected, which otherwise would have been brought to the said market

(1) It is not necessary in this action, any more than it is in an action for not grinding at the plaintiff's mill (see *ante* 113. *b. Coryton v. Lithebye*, note 1.) to state, that the plaintiff was *seised in fee* of the place where the market is held, or that he was seised of an ancient market *as of fee and right*, but the present mode of declaring is to say, "For that
"whereas the (plaintiff) on &c. in such
"a year of our Lord, and before, was,
"and from thence hitherto has been
"and still is lawfully *possessed* of a cer-
"tain, &c. (the place where the plain-
"tiff's market is kept) in &c. in the
"county of B. and of a market holden,
"and to be holden there, in or upon
"every *Wednesday* for the buying and
"selling (stating the nature of the
"market) together with *toll, stallage,*

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"piccage, and other commodities to such
"markets appertaining or belonging,
"whereby great gains, profits and ad-
"vantages during all the time afore-
"said, until the committing of the grie-
"vance hereafter mentioned, accrued
"to and were received by, and still
"ought to accrue to, and be received
"by, the said *Richard*, to wit, &c."
Where the plaintiff's market is erected by charter, it is the safest way not to state in the declaration all the words used in the charter respecting toll, stallage, and the like; but only to state those about which there is no doubt. The words used above in this precedent "toll, stallage, piccage," or without "piccage," seem to be the material words applicable to this action.

of the plaintiff, holden during all the time aforesaid every *Wednesday* in every week in the year, to be there sold, to the great damage of the said plaintiff, and the great nuisance of the said market of the plaintiff, and by reason thereof, he the said plaintiff has lost and been deprived of the *toll, stallage*, and other profits, commodities and advantages, which he might otherwise have had, to the damage of the plaintiff, &c. Upon not guilty pleaded, it was found for the plaintiff at the assizes, and 60*l.* assessed for damages.

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And now *Jones* for the defendant moved in arrest of judgment, that here could be no damage to the plaintiff by law, because it appears that the plaintiff's market is holden on *Wednesday* in every week, and the defendant's market is holden on *Tuesday* in every week, therefore the defendant's market, being holden on a different day from the plaintiff's market, cannot injure the plaintiff's market. For he said it was impossible that the defendant's market on *Tuesday* should do any damage to the plaintiff's market on *Wednesday*, because those who have occasion to go to market on *Wednesday* will come to the plaintiff's market, and they cannot go elsewhere, for the defendant does not then hold any market, and so no damage to the plaintiff's market. But it would have been otherwise if the defendant had held a market on the *same day* with the plaintiff; for then the plaintiff's market would be diminished, and the chapmen who have occasion to go to market might go to the defendant's market; but they cannot do so here, wherefore the plaintiff is not damnified in judgment of law. And to prove that it was no damage to the plaintiff, and that a market holden upon one day cannot be a nuisance to a market holden on another day, he cited 2 Roll. Abr. 140. (G.) pl. 2. where it is said, that if a man levies a market or fair to be holden *on the same day* that my market or fair is holden, in a town which is near to my fair or market, whereby my fair or market is impaired, it is a nuisance to my market or fair, &c. wherefore it appeared to him that it may well be collected from the book, that if the fair or market is not holden *on the same day* with my market or fair, but holden on another day, it is not any nuisance to my market or fair. Wherefore he concluded that in the case at bar, the levying

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of the defendant's market holden on one day, could not be any nuisance to the plaintiff's market holden on another day, and so prayed that judgment should be arrested.

Afterwards at another day, *Saunders* for the plaintiff moved for judgment, and said that it appears here that the defendant's market is a nuisance to the plaintiff's market, although it be holden on another day; for the plaintiff's market is holden on a *Wednesday*, and the defendant holds his market on every *Tuesday* before, so that the defendant by his market forestalls the plaintiff's market; and when persons have furnished themselves with commodities on *Tuesday*, they have no occasion to go to the plaintiff's market on *Wednesday*, being the next day after the defendant's market. And it is worse for the plaintiff, and more to his damage, than if the defendant had holden his market on the same day with the plaintiff; for then the plaintiff might have some chapmen to come to his market as well as the defendant; but now the defendant by holding his market the day before prevents all chapmen from coming to the plaintiff's market the next day after. And here the plaintiff has averred his damage, and on issue joined, the jury have found that the plaintiff is damnified in his market by the levying of the defendant's market, and have assessed the plaintiff's damages accordingly on their oaths. And if they have assessed damages where the plaintiff was not damnified, the defendant may help himself by a writ of attain on the false verdict; but now when the jury have found upon their oaths that the defendant's market is a nuisance, and damage to the plaintiff's market, the court cannot entertain any doubt of it. And the objection made by the counsel on the other side might have been evidence to the jury that the defendant's market was no nuisance or damage to the plaintiff's market; but it was only evidence, for it may be possible that it will be a nuisance, and it may be possible that it will not be a nuisance, of which the jury are judges: And they have found here that it is a nuisance and damage to the plaintiff, wherefore they have assessed his damages; and consequently the defendant cannot now say that his market is not a nuisance; or damage to the plaintiff, when the jury have found the contrary on their oath. And as to 2 Roll. Abr.

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140. he answered, that nothing can be collected out of that book one way, or other; for the book says no more than that if a market be levied on the same day with my market, it is a nuisance to me. And so it is without doubt: and so also it may be, if it be levied on another day, as in the case at bar, for any thing that may be inferred from the said book, or from the book of 22 H. 6. 14 b. where *Paston* says the same words *arguendo* as are in the said case in *Rolle*. But no book warrants such a distinction as has been now made at the bar, for there is no such diversity in the books of (b) 41 Edw. 3. 24. b. (c) 11 H. 4. 47. b. F. N. B. (d) 184. a. Reg. 200. a. but they say generally that if a new market be erected too near my ancient market it is a nuisance: and whether it be on the same day with my market, or on another day, is not made any question in those books. But the book of 11 H. 4, 5, & 6. (e) is expressly in point, for there issue is joined whether a new market holden on *Saturday* is a nuisance to an ancient market holden on *Tuesday*, and it is held a good issue on debate, and process awarded to try it, which is the very point now in question; wherefore he prayed judgment for the plaintiff here.

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(b) Bro. *Action sur le case* 14.
(c) Bro. *Nuisance* 10.
(d) See notes (a) and (b).

(e) Bro. *Scire facias*.

And after the matter had been debated, the whole court, except *Kelynge* chief-justice, who was absent during the whole term on account of indisposition, gave judgment for the plaintiff. And *Twyssden* said, that if the defendant had a patent to levy his market, perhaps it might be more doubtful; for it appears in this case that the defendant *without any lawful warrant or authority*, that is to say, without patent or prescription, has levied his market to the nuisance of the plaintiff's which was an ancient market, and therefore the defendant was an apparent wrong-doer, and had no colour for doing so; wherefore he said that it was clear that the plaintiff ought to have his judgment; and he had it accordingly (2).

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(2) In note (b.) to F. N. B. 184. a. or 428. A. 7th edit. above cited, it is said, that if the market be on the *same day*, it shall be intended a nuisance, but if it be on *another day*, it shall not be so

intended, and therefore it shall be put in issue *whether it be a nuisance or not*, and the above mentioned case of 11 H. 4, 5. is cited, which was a *scire facias* for the king to repeal a patent for holding

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ing a market. Though the king's grant of a fair or market has always a clause in it, *that it shall not be to the nuisance of another fair or market*, yet according to the opinion of Lord Coke, these words are only put for an example; for if it occasions any damage either to the king or subject *in any other thing*, the fair shall be revoked. 2 Inst. 406. and if such clause were omitted it would be implied by law. 3 Lev. 222. *Rex v. Butler*. See *ante*, 72. q.

Where a grantee of a market under letters patent from the crown, suffered another to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, it was adjudged that such user operated as a bar to *an action on the case* for a disturbance of his market. Such a length of uninterrupted possession was considered by Eyre C. J. of C. B. who tried the cause, not as *evidence* to the jury from which they might presume a grant of a market to the defendant prior to the plaintiff's grant, but as a complete answer, or bar, to the action; he therefore nonsuited the plaintiff, and the court, on a motion to set aside the nonsuit, were clearly of the same opinion. 1 Bos. & Pull. 400. *Holcroft v. Heel*. An action on the case, being a possessory action, was, it is presumed, considered by the court to be in the nature of an ejectment; and as no one can recover in an ejectment unless he, or those under whom he claims, have been in possession within twenty years; or rather, as an adverse uninterrupted possession by another for twenty years, is a bar to an ejectment, so an uninterrupted possession of an easement for the same time is considered as a bar to an *action*

on the case, which has for its object, in common with an ejectment, the obtaining of the possession, or at least, the dispossessing of the defendant of it. There is no positive law, which says that no *ejectment* shall be brought by any person who has not by himself, or by some other under whom he claims, been in possession of the estate for which the ejectment is brought within twenty years; but it is a rule adopted in analogy to the statute of limitations 21 Jac. 1. c. 16. s. 1.; which enacts that no person that has any right or title of entry *shall enter* but within twenty years next after his right or title shall accrue; and if a person cannot *enter* after that time, he cannot of course maintain an ejectment, which is founded on an *entry*, either actual or fictitious, supposed to have been made by his lessor.

From the before mentioned case of *Holcroft v. Heel*, it seems necessarily to follow, that where a person has used and enjoyed an easement for twenty years and upwards, though it was a wrongful user at first, he thereby gains such a right, that if he be disturbed in the enjoyment of it, he may maintain an action on the case for the disturbance, and it is no answer to shew that the plaintiff originally obtained the user and possession of it by usurpation and wrong. However, though an uninterrupted possession of an easement for twenty years or upwards was considered in the above case as a *bar* to an action on the case brought against him who had so used it, or to give him such a right as to enable him to maintain an action on the case for the disturbance of it, notwithstanding the origin of his possession

possession might be shewn, yet in many cases it has been considered to be only evidence from which the jury are directed by the court to presume a grant, licence, or agreement. And in 3 East, 218. *Campbell v. Wilson, Le Blanc* justice, said that the ground on which the case of *Holcroft v. Heel* went off was, that the court having intimated their opinion, that if the case went down to trial again upon the same facts, it would be left for the jury to find for the defendant upon the ground of presumption of a grant after twenty years uninterrupted user of the market, the plaintiff's counsel said, that if it were to be left to the jury in that manner, with the recommendation of the court in favor of such a presumption, it would answer no purpose to go to trial again. So in *Lewis v. Price, Worcester* spring assizes 1761, which was an action on the case for stopping and obstruſting the plaintiff's lights, *Wilmot J.* said, that where a house has been built forty years, and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties; and he said that twenty years is sufficient to give a man a title in judgment, on which he may recover the house itself; and he saw no reason why it should not be sufficient to intitle him to any easement belonging to the house. So in an action on the case for stopping up ancient lights, the defendant attempted to shew that the lights did not exist more than sixty years, *Wilmot C. J.* said,

that if a man has been in possession of a house with lights, belonging to it for fifty or sixty years, no man can stop up those lights. Possession for such a length of time amounts to a grant of the liberty of making them; it is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of right, the highest writ in the law. If my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd. But the action can only be maintained for damages so far as the lights originally extended, and not for an increase of light by enlarging the windows recently; and I should think a much shorter time than sixty years might be sufficient; but here there has been a possession of that time. *Dougal v. Wilson*. Sittings C. B. Trin. 9. Geo. 3. So in an action on the case for obstructing a way, the plaintiff proved that F. was seised of the plaintiff's tenement and the defendant's close, and in 1751 conveyed the tenement to the plaintiff with all ways therewith used and that this way had been used with the tenement as far back as memory could go. The defendant produced a fulfilling lease from F. for three lives made in 1723, by which F. demised the field in question in as ample a manner as one R. a former tenant held it, and in the lease there was no exception of a way over the close. *Tates J.* held that by the lease without any reservation the way was gone, and therefore could not pass under the words all ways; but as thirty years had intervened between the defendant's lease and the plaintiff's conveyance, and the way

way had been used all the time, that was sufficient to afford a presumption of a grant or licence from the defendant so as to make it a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass. Bull. Nis Pri. 74. *Keymer v. Summers*. If trespass be brought against a person for using a way under similar circumstances, as he cannot prescribe for the way, he must justify under a non existing grant, and so excuse a profert. As where in trespass *quare clausum fregit* in B, the defendant justified under a grant of a right of way over B. by a deed lost by time and accident; and on issue joined on a traverse of the grant, it appeared in evidence that the way had been used adversely, and not by leave and favour, for twenty years and more, over the close B. Which adverse user of the way for so long a period the learned judge at the trial thought sufficient to leave to the jury to presume a grant; and the court of K. B. on a motion for a new trial confirmed his opinion. 3 East, 294. *Campbell v. Wilson*. This is a strong case: for the grant must be presumed to have been made within twenty-six years, because at that time all former ways had been extinguished by the operation of an inclosure act. So in an action on the case for obstructing the plaintiff's lights, who proved an uninterrupted possession of them for twenty-five years past; Gould J. who tried the cause then called upon the defendant to shew if he could answer this, because, if unanswered, he thought it sufficient to establish the plaintiff's case. The defendant upon this offered a grant from the former owner of the

defendant's premises to the plaintiff's predecessor dated June 1750, by which he granted him liberty to put out a particular window, and argued that having this grant and no other, it must be presumed that the plaintiff never had any other, and this would be an answer to the presumption arising from length of possession. The judge thought the grant would not alter the case, as it related to a particular window, which was not included in the present action, and no exception of any other, or reference was mentioned in the grant. The defendant then relied on the possession previous to these twenty-five years; but the judge said that would not avail them; he thought twenty years possession unanswered was sufficient, and if the defendant had any evidence to explain the possession within twenty years, to shew it was limited, or modified, or had in its commencement, that would be material; the defendant offered none such, and there was a verdict for the plaintiff; the judge however reserved the point of law if the defendant thought fit to move the court. Afterwards a rule to shew cause why there should not be a new trial was obtained on the ground of a misdirection; because the judge told the jury that so long an enjoyment was sufficient to give the plaintiff a right to them, although the defendant offered to prove that there were no lights there previous to that time; but that this evidence was not received: and the counsel for the rule insisted that the judge had called the twenty-five years possession an absolute bar, incapable of being overturned by any contrary proof, where it was only a presumptive proof which might

might be explained away ; that it was a matter of fact for the jury, but the judge left nothing to the jury, treating it as a matter of law. Lord *Mansfield*. I think there must be some mistake in the statement of what passed at the trial ; the enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it ; but it is impossible that length of time can be said to be an *absolute bar*, like a statute of limitations ; it is certainly a *presumptive bar* which ought to go to a jury. Thus in the case of a bond, there is no statute of limitations that bars an action upon it, but there is a time when a jury may presume the debt to be discharged, as if no interest appear to have been paid for sixteen or twenty years. The same rule prevails in the case of a highway. Time immemorial itself is only presumptive evidence ; for so it was held in the case of the *Mayor of Kingston upon Hull v. Horner*, Cowp. 102. In a case before me at *Maidstone*, I held length of time, when unanswered and unexplained, to be a bar. *Willes J.* There was a case before me at *York* where I held uninterrupted possession of a pew for twenty years to be presumptive evidence merely, and that opinion was afterwards confirmed in the court of common pleas. *Ashburst J.* I should have thought it was the duty of the counsel for the defendant to have told the judge that this evidence was only a presumptive, not an absolute bar ; (to which it was answered by *Coke* of counsel for the defendant, that it was so, and a case was cited where forty years were held not to be

an absolute bar). *Buller J.* I incline very much to think that the judge was misunderstood, for he could never call it an absolute bar. In the *Wells* harbour case this court went fully into the doctrine, and the rule of law is clear, that length of time is presumptive evidence only. The judge said, " I think twenty years uninterrupted possession of these windows, is a sufficient right for the plaintiff's enjoyment of them." Now that expression is open to a double construction. If the judge meant it was an absolute bar, he was certainly wrong ; if only as a presumptive bar, he was right. The court seemed much inclined to discharge the rule, but the counsel for the defendant pressing it much, it was made absolute. However the next day *Buller J.* said that *Ashburst J.* had waited on Mr. *J. Gould* who said he never had an idea but it was a question for a jury ; and would have left it to the jury, if the counsel for the defendant had asked it ; that he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion. *Darwin v. Upton*. Mich. 26. Geo. 3. K. B. Rule discharged.

So in an action on the case for disturbing the plaintiff in the possession of a pew in a church, which the plaintiff and those under whom he claimed had been in the uninterrupted enjoyment of for thirty-six years, but which appeared in evidence to have been an open pew before that period, the learned judge recommended it to the jury to presume a title in the plaintiff after so long a possession as thirty six years, and the court of K. B. afterwards on a motion for a new trial, held the direction of the

the judge was proper. *Rogers v. Brooks*, cited in 1 Term Rep. 431. note (a). But the pew must be laid in the declaration *as appurtenant to a messuage in the parish*, otherwise a bare possession of the pew for sixty years and more is not a sufficient title to maintain an action on the case for disturbing the plaintiff in his enjoyment thereof, but he must prove a prescriptive right, or a faculty. 1 Term Rep. 428. *Stocks v. Booth*. However in an action on the case for disturbance of a pew, it was adjudged that uninterrupted possession of a pew in the chancel of a church for thirty years, was presumptive evidence of a prescriptive right to the pew in an action against a wrong doer; but that presumption might be rebutted by proof that the pew had no existence thirty years ago. 5 Term Rep. 296. *Griffith v. Matthews*.

But though an uninterrupted possession for twenty years or upwards should be sufficient evidence to be left to a jury to presume a grant; yet the rule must ever be taken with this qualification, that the possession was with the acquiescence of him who was seised of an estate *of inheritance*: for a tenant for life or years, has no power to grant any such right for a longer period than during the continuance of his particular estate. If such a tenant permits another to enjoy an easement on his estate for twenty years or upwards without interruption, and then the particular estate determines, such user will not affect him who has the inheritance in reversion or remainder; but when it vests in possession the reversioner may dispute the right to the easement, and the

length of possession will be no answer to his claim. Thus where A. being tenant for life with a power to make a jointure, which he afterwards executed, gave licence to B. in 1747, to erect a wear on the river 'T. in A.'s soil for the purpose of watering B.'s meadows, and then A. died, and the jointress entered and continued seised down to the 1799, when the tenant of A.'s farm diverted the water of the river from the wear; upon which the tenant of B.'s farm brought an action on the case for diverting the water: it was held by the court of K. B. that the uninterrupted possession of the wear for so many years with acquiescence of the particular tenants for life did not affect him who had the inheritance in reversion; but as the court entertained some doubt of the fact of the licence, and as the verdict for the plaintiff would not conclude the rights of the parties, they did not think it right to disturb the verdict: but the court was of opinion upon the point of *law* as above stated. *Bradbury v. Grinsell*. Mich. 41. Geo. 3. K. B. See 2 Salk. 422. *Hunt v. Burn*. 1 Bro. Par. Cas. 48. 1 Lutw. 731, 782. S. C. But the reversioner may in all cases bring an action where a stranger does an act which injures the inheritance and renders it of less value. 4 Burr. 2141. *Jeffer v. Gifford*.

With respect to the difference between length of time which operates as a *bar* to a claim, and that which is only used by way of *evidence*. See Cowp. 108, 109. *Mayor of Hull v. Horner*. Ibid. 214. *Eldridge v. Knott*. 1 Term Rep. 272. *Oswald v. Legh*.

Wotton *versus* Hele.

Case 12.

Mich. 21 Car. 2. Regis. Rot. 210.

MIDDLESEX, to wit. BE it remembered that heretofore, to wit, in the term of St. Hilary last past before our lord the king at *Westminster* came *John Wotton* by *Richard Hals* his attorney, and brought here into the court of our said lord the king then there his certain bill against *Penelope Hele* widow, late wife of *John Hele* esq. deceased, in the custody of the marshal, &c. of a plea of breach of covenant, and there are pledges of prosecution, to wit: *John Doe* and *Richard Roe*, which said bill follows in these words; to wit: *Middlesex*, to wit, *John Wotton* complains of *Penelope Hele* widow, late wife of *John Hele* esq. deceased, being in the custody of the marshal of the marshalsea of our lord the king of a plea of breach of covenant, for this, to wit, that whereas a certain fine (1) was levied in the court, of the late pretended keeper of the liberties of *England* by authority of parliament, of the bench, at *Westminster* in the county of *Middlesex*, from the day of St. *Michael* in one month, in the year of our Lord 1649, before (2)

Declaration in
covenant.

A fine *sur con-*
cuisse levied

Oliver

(1) Although it was said by *Fitzherbert* justice obiter, and the prothonotaries, that in pleading a fine it is not proper to say that a fine was levied generally, but it should be shewn, that A. B. *was seised* &c. and so seised the fine was levied, Bro. *Fines*, 3; yet in Dyer. 291. a. it is said that the ancient course of pleading a fine was not to allege a seisin in the parties to the fine or any of them, but generally that a fine was levied; for it might be of a reversion, of which seisin cannot be alleged. 1 Leon. 255. *Weston v. Garmon's* case. Therefore, where in replevin the defendant avowed because

one S. M. *was seised in fee* of the place in which, &c. and being so seised levied a fine to certain uses, the plaintiff in his plea in bar *traversed the seisin in fee* of the said S. M. at the time of levying the fine, and issue being joined thereupon, and a verdict found for the plaintiff, judgment was arrested, and a repleader awarded, because the seisin in fee was not traversable, and therefore the issue immaterial. 2 Lutw. 1608. 1625. *Walters v. Hodgins*. Sav. 85.

(2) See 1 Saund. 258. *Took v. Glycock*, note (7): it is however doubtful whether Plow. 105. a. there cited warrants the observation; see Com. Dig.

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of certain pre-
mises
(d) Vid. 1 Leon.
255.

Habendum to the
plaintiff for 99
years, after the
death of
three persons,
if the plaintiff
and another shall
so long live.

H. and the
defendant his
wife warranted
the premises to
the plaintiff
against all men,
during the term.

Oliver St. John, John Pulliston, Peter Warburton, and Edward Atkins, justices, and other faithful persons then there present, between the said John Wotton, and one Richard Shapleigh, one Bartholomew Bynmore, and one John Hill, by the names of Richard Shapleigh, John Wotton jun. Bartholomew Bynmore complainants, and the said John Hele and Penelope, by the names of John Hele and Penelope his wife, deforceants (a) (among other things) of one messuage, two gardens, two orchards, ten acres of land, five acres of meadow, ten acres of pasture, thirty acres of furze and heath, and common of pasture with the appurtenances, ~~to have and hold~~ the tenements and common of pasture aforesaid with the appurtenances to the said John Wotton for the term of 99 years next after the decease of William Wotton of Woodland, and John Wotton and Elizabeth his wife, if the said John Wotton jun. now plaintiff, and Grace Wotton daughter of Philip Wotton of Ilfington, or either of them, should so long live. And the said John Hele and Penelope, and the heirs of the said John, did warrant (3) to the said John Wotton the aforesaid tenements and common of pasture with the appurtenances against all men

Fine (H. 2.) : for in 1 H. 7. 10. b. pl. 13. Bro. *Fines*, 125. it is said, that in pleading a fine every one of the justices of the common bench must be named by their names, though other writs which come out of Chancery are directed to T. B. chief justice of the common bench, and his fellows, without expressing their names, but it is otherwise of a fine : and so are all the precedents of pleading a fine. Plow. 353. Co. Ent. 171. a. 182. a. Clift. 305. 2 Lutw. 2016. So he who pleads a fine ought to shew in *what term*, and *what place*, as at *Westminster* ; for the party may plead no such record or fine. Bro. *Pleadings*, 167. And it is a fine of that term when the concord was made,

and of which the writ of covenant was returnable ; for the agreement made in court makes the fine complete. 1 Salk. 341. *Lloyd v. Lord Say and Seal* : but it is not necessary to say that the fine was levied in the common Bench. Plow. 431. b. *Smith v. Stapleton*.

(3) It appears by the warranty by the husband and wife, and the heirs of the husband, that this was the husband's estate, in which the wife had only a right of dower, or a jointure, and not the wife's estate ; for in all cases where a fine is levied by husband and wife of lands which are the estate of the wife, the warranty is from the husband and wife, and the heirs of the wife. 2 Roll. Abr. 17. (O.) pl. 3. No mention is here

men during all the term aforesaid, as by the record (4) of the said fine remaining in the court of the bench aforesaid more fully appears. By virtue of which said fine, the said John Wotton jun. was possessed of the (5) interest of the said term of 99 years, if he the said John Wotton jun. and Grace, or either of them should so long live; and being so possessed thereof the said William Wotton, and John Wotton and Elizabeth his wife afterwards, to wit, on the 6th day of September in the 15th year of the reign of our lord Charles the Second now king of England, &c. at Westminster aforesaid, died; after whose death he the said John Wotton jun. entered into the tenements aforesaid with the appurtenances, and was possessed thereof, and being so possessed thereof the said John Hele afterwards, to wit, on the 7th day of September in the aforesaid 15th year of the reign of our said lord Charles the Second now king of England, &c. at Westminster aforesaid, likewise died, and the said Penelope survived. And the said John Wotton jun. in fact says, that one Hugh Stowell esq. after the commencement of the term aforesaid, and during the term aforesaid, and before the day of exhibiting this bill, to wit, on the 29th day of September in the 18th year of the reign of our said lord the now king, having a lawful right and title to the tenement aforesaid with the appurtenances, entered into the same in and upon the possession of him the said John Wotton jun., and ejected, expelled and amoved the said John Wotton jun. against the will of the said John Wotton, by due process of law, from the possession and occupation of the said tenements, and kept

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The three persons died,

and plaintiff entered and was possessed.

here made of any proclamations; for a feme-covert may convey her own estate, or bar herself of her dower or jointure by a fine without proclamations, as well as with; because a fine derives this effect from the principles of the common law, and not from any statute. Cruise 107. 2d edit. See 1 Saund. 259. note (8).

(4) The words in italics may be omitted; they are so in *Willion v. Berk-*

ley, Plow. 224. and which omission was held proper in a subsequent case. 1 Leon. 77. *Zouch and Bamfield's case*. So where a fine with proclamations is pleaded, and the words "as by the record of the said fine" are used, it is not necessary to add the words "and by the proclamations." 1 Leon. 77.

(5) See 1 Saund. 251. *Took v. Glascock*, note (1).

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and held out, and still keeps and holds out, him the said *John Wotton jun.* so thereof expelled from his possession thereof, against the form and effect of the said fine and warranty (6). And so the said *John Wotton jun.* says, that the said *Penelope*, after the death of the said *John Hele* (although often required), has not kept, but has broken, his aforesaid covenant of the said warranty, and to keep the same with the said *John Wotton jun.* has altogether refused, and still refuses; to the damage of the said *John Wotton jun.* of 600l., and therefore he brings suit, &c.

Pla.

And now at this day, to wit, on *Saturday* next after three weeks of *St. Michael* in this same term, until which day the said *Penelope* had leave to imparl to the said bill, and then to answer, &c. before our lord the king at *Westminster* comes as well the said *John Wotton jun.* by his attorney aforesaid, as the said *Penelope* by *Samuel Marwood* her attorney, and the said *Penelope* defends the wrong and injury when, &c. and

Actio: non.

says that the said *John* ought not to have or maintain

(6) In covenant against the representatives of J. W., the declaration stated that the said J. W. by indenture granted certain premises to the plaintiff in fee, and warranted them against himself and his heirs, and covenanted that he was, notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee-simple, and that he had a good right, full power and lawful and absolute authority to convey, and assigned a breach that J. W. had not at the time of making the said indenture, nor at any time before or since good right, full power, and lawful and absolute authority whatsoever to convey or assure the said premises to the plaintiff in manner aforesaid. The defendant prayed oyer of the indenture, by which it appeared that J. W. covenanted for him-

self, his heirs, executors and administrators, to make a cart-way, and that the plaintiff should quietly enjoy without interruption from himself, or any person claiming under him; and lastly, that he, his heirs and assigns, and all persons claiming under him, should make further assurance, and then demurred; and on argument it was held that the words, "that he had a good right, full power, and lawful and absolute authority to convey," were either part of the preceding special covenant, "that he was, notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee;" or if not, that they were qualified and restrained by all the other special covenants, to the acts of himself and his heirs. 2 Bos. & Pull. 13. *Browning v. Wright*.

his aforefaid action thereof againſt her, becauſe proteſting that ſhe the ſaid *Penelope* has, from the time of levying the fine aforeſaid hitherto, well and faithfully kept her covenant of the ſaid warranty on her part to be kept; and proteſting alſo that the ſaid *Hugh Stowell* from the time of his entering into the ſaid tenements had not any lawful right or title to the ſame tenements with the appurtenances, for plea ſhe the ſame *Penelope* ſays that the ſaid *Hugh Stowell* did not eject, expel or amove the ſaid *John* from the poſſeſſion, and occupation of the ſaid tenements, as the ſaid *John* has above thereof declared againſt her: and this ſhe is ready to verify; wherefore ſhe prays judgment if the ſaid *John* ought to have or maintain his aforeſaid action thereof againſt her, &c.

And the ſaid *John Wolton* ſays, that he, by any thing by the ſaid *Penelope* above in pleading alleged, ought not to be barred from having his ſaid action thereof againſt the ſaid *Penelope*, becauſe he ſays; that the ſaid *Hugh Stowell* did eject, expel and amove the ſaid *John* from the poſſeſſion and occupation of the ſaid tenements, in manner and form as he the ſaid *John* has above thereof complained againſt her, and this he prays may be inquired of by the country, and the ſaid *Penelope* thereof likewiſe, &c.

Therefore the ſheriff of the county of *Devon* is commanded that he cauſe to come, before our lord the king at *Weſtminſter*, on *Saturday* next after the octave of the purification of the bleſſed *Mary*, twelve, &c. of the neighbourhood of *Bickington* in the ſaid county of *Devon*, by whom, &c. who neither, &c. to recogniſe, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid there, &c.

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Proteſting that defendant has always kept her covenant, and that H. S. had no title to the premises;

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ſays that H. S. did not eject the plaintiff from the premises.

Replication.

That H. S. did eject the plaintiff from the premises,

and iſſue thereon.

Vainre facias awarded.

Case 32.

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Mich. 21 Car. 2. Regis, Rot. 210.

S. C. 1 Lev. 301.

1 Sid. 466.

2 Keb. 684.

703. 723.

1 Mod. 66. 290.

A warranty by

baron and feme,

annexed to an

estate for years

in a fine, will

bind the feme,

though under

coverture at the

time: and an

action of cove-

nant will lie

against the feme

thereon after the

death of the

baron. In co-

venant on a war-

ranty of lands

for years, the

plaintiff ought

to show what

estate or right

he who entered

into the lands

had at the time

of his entry, and

it is not suffi-

cient to aver that

he had a good

title.

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COVENANT by *Wotton* plaintiff against *Hele* defendant: the plaintiff declares that in *Michaelmas* term 1649, a fine *sur concessit* was levied in the common bench between the said plaintiff and others, then plaintiffs, and one *John Hele* esq., late the husband of the said defendant and the said defendant then his wife, deforceants, of certain lands in the county of *Devon*; by which fine the now defendant and her said husband granted the tenements to the said plaintiff for 99 years, if he should live so long, to commence after the deaths of others whom the plaintiff averred to be dead; and that the said husband and the defendant his wife by the said fine warranted the said tenements to the said plaintiff against all men during all the said term, as by the said fine appears; and the plaintiff further avers that, by force of the said grant by the said fine, after the deaths of the said other persons he entered into the said tenements and was possessed thereof, and that afterwards the said *John Hele* the late husband of the said defendant died, and the defendant survived him, and then the plaintiff assigns the breach in this manner, namely, "That one *Hugh Stowell* esq. after the commencement of the said term, and during the said term, and before the day of exhibiting this bill, to wit, on the 29th of *September* in the 18th year of the reign of the now king, having a lawful right and title to the said tenements with the appurtenances, entered into the same in and upon the possession of the said *John Wotton*, (namely the plaintiff), and ejected, expelled and amoved him (the plaintiff) against his will by due process of law from the possession and occupation of the aforesaid tenements, and kept and held out, and yet holds out the said (plaintiff) so expelled from his possession thereof, against the form and effect of the said fine and warranty," &c. and so the plaintiff says that the defendant has broken her covenant to the damage

damage of the plaintiff, &c. wherefore he brought this action.

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v. HELE.

The defendant by protestation that the said *Stowell* had no right, &c. for plea says that the said *Stowell* did not eject, expel or amove the said plaintiff from the possession and occupation of the said tenements in manner and form as, &c. upon which issue at the assizes in *Devonshire* a verdict was found for the plaintiff, and 60l. damages assessed.

And now *Saunders* for the defendant moved in arrest of judgment, that the plaintiff had not well assigned his breach, because he had not shewn what estate or right *Stowell* had to the said tenements at the time of his entry into them. And he said that a warranty is only a covenant against the *rightful*, and not against the *wrongful*, entry of a stranger; and so are the books (b) 26 H. 8. 3. b. (7) and the case of *Tisdale v. Sir William Essex* (8), Hob. 35. therefore, if the defendant

(b) Bro. Covenant 1.
Garranties 2.

(7) A man leases for years by indenture, and covenants to warrant the lands during the term to the lessee, his heirs and assigns; the lessee is ousted by one who has no right; it was holden that the lessee cannot maintain covenant against the lessor, because he is ousted by wrong, and no mischief arises to the lessee from it, inasmuch as he may have an action of trespass or ejectment against him who ousted him; but if the lessee be ousted by one who has a title paramount, *against whom he has no remedy*, he may bring covenant against the lessor by force of these words of warranty. 26 H. 8. 3. b.

(8) The law will never adjudge that a lessor covenants against the *wrongful* acts of strangers, except his covenant is express to that purpose; for the law itself does defend every man against wrong, and therefore though one warrants land to another expressly, yet he

does not defend against *tortious entries*; but in *Dyer*. 328. a. an express assumption that the lessee shall enjoy quietly and peaceably, *without the eviction or interruption of any one*, will bind the lessor against wrongful entries. Hob. 35. So if in a lease for years the lessor covenants, that the lessee might or should peaceably, quietly and lawfully have, hold and enjoy the premises without the interruption of *him, or any other person*; in debt on bond to perform these covenants, the plaintiff assigned a breach, namely, the entry of a stranger who had no right; and the opinion of *Coke* and the court clearly for the plaintiff. *Dyer*. 328. a. *in marg.* But the case in *Dyer* has been questioned, and indeed overruled; thus, where the condition of a bond was, that if the obligee enjoy &c. according to the indenture, without the let, or interruption of *any person*, it was agreed by all the justices that if he be

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defendant by the said warranty in the fine is not bound to defend the plaintiff in his possession but only against those who have a right to the land, the plaintiff ought to have shewn how *Stowell* had a right to the tenements so warranted. And it is not enough for the plaintiff to say that *Stowell* having a lawful right and title entered into the tenements, because *Stowell* might have at the time of his entry a lawful right and title to the tenements aforesaid, &c. under the plaintiff himself, which is not within the defendant's covenant. For the plaintiff himself might make a lease for years to *Stowell* to begin on the day of his entry, whereby *Stowell*, having a lawful right and title, (namely, under the plaintiff himself,) entered into the tenements and ousted the defendant from them, as he well might, and yet the defendant's covenant not broken. And it is not shewn in the declaration, that *Stowell* had a right or title to the tenements before the fine was levied, and therefore it shall be intended that he had a right to the tenements at the time of his entry by a puisne title, to which the defendant's covenant does not extend. And for a case in point, he cited the case of *Kirby v. Hanfaker*, Cro. Jac. 315 (b). Error was brought in the Exchequer Chamber on a judgment in debt, which was on condition that the obligee should enjoy such lands without eviction, and the breach was assigned in a recovery by verdict in an ejectment on a lease made by one *Essex*, but he had not shewn what title *Essex* had to make the lease, but only averred that *Essex* had

(b) S. C. Jenk.
240. pl. 91.
S. C. cited and
approved 3 Mod.
235. *Moffe v.*
Archer.

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ousted by one who has no right, the bond is not forfeited, for it shall be intended of lawful lets and interruptions: and the same law by *Periam*, if the words according to the indenture had been omitted. Dyer. 328. in marg. Mich. 26. & 27. Eliz. C. B. So in a modern case it was holden, that the words of a covenant, "without the let of the defendant and his heirs, and of all and every other person or persons whomsoever," were restrained to lawful inter-

ruptions; for even a general warranty, which is conceived in terms more general than that covenant, has been restrained to lawful disturbances. 3 Term Rep. 587. *Dudley v. Folliot*. See also Cro. Eliz. 914. *Chantflower v. Priestley*. Cro. Jac. 425. *Broking v. Cham*. Cro. Car. 5. *Hamond v. Dod*. 1 Roll. Abr. 429. pl. 7. 430. pl. 11, 12. Vaugh. 118. 119. 120. 122, 123. *Hayes v. Bickerstaff*. Com. Rep. 230. *Southgate v. Choplin*. 10 Mod. 384. S. C.

a good

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a good title; and this, says the book, might be derived from the plaintiff after the making of the bond; and therefore it ought to have been averred, that *Essex* had a good and elder title before the bond made; and although issue was joined that the recovery in the said action of ejectment was by covin, and not by a lawful title, and it was found for the plaintiff, that the recovery was on a lawful title, and not by covin, yet it did not aid the defect in the replication, or the bad assignment of the breach; wherefore the judgment was reversed by all the justices and barons. Which is the same case in effect with the case here; and that case was after verdict, as the case here is; wherefore he prayed that judgment should be arrested: and thereupon judgment was staid, and the court directed that it should be argued on both sides.

And at another day it was argued again by *Sympsen* for the defendant, and by *Jones* for the plaintiff. And *Sympsen* argued to the same effect as before, but he also took another exception, that the action of covenant lies not upon the warranty, because it appears that the defendant at the time of the fine levied was a feme-covert. For although femes-covert may pass their rights in lands by fine, because they are examined by a judge of record, yet they cannot bind themselves in a personal security by covenant, as in this case; for a feme-covert cannot covenant to pay damages, nor can she bind herself in a statute or recognisance, though her husband join with her; wherefore he concluded that the declaration was also bad in this point.

Jones for the plaintiff as to the first matter said, that the declaration was good enough especially after verdict; for he said it does not lie in the knowledge of the plaintiff how *Stowell* derives his title to the tenements, for the plaintiff was an entire stranger to *Stowell's* title, and therefore could not precisely shew *Stowell's* title in the declaration. But it is sufficient for the plaintiff to shew that *Stowell* has evicted him on a good title; and here the defendant has admitted that *Stowell* had a good title by pleading that *Stowell* did not enter, &c.; for the defendant might have said that *Stowell* had not a good title, and then it might have been tried; but
now

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now the defendant has admitted *Stowell* to have a good title, but insists in her plea that *Stowell* did not enter: and issue being joined thereon, which is now found for the plaintiff against the defendant, the court here ought to intend that *Stowell* had a good title, and that his entry was a breach of the covenant upon which the plaintiff has now brought his action: and the rather, because it is said in the declaration that *Stowell* entered, and ousted the plaintiff from the tenements, and kept him out *against the form and effect of the fine and warranty aforesaid*; which implies that it was such an entry and ouster by *Stowell*, that it was by a title paramount the fine, for otherwise it cannot be said that it was *against the form and effect of the fine and warranty aforesaid*. He also said that, if, on the trial, the evidence had been that *Stowell* had only a title under the plaintiff himself, the judge of assize would have directed the jury to find for the defendant. And as to the exception that *Sympson* had taken to the declaration, he said that it is commonly seen, that *femes-covert* with their husbands by fines warrant lands in fee-simple every day, and it binds them to warranty; but when a warranty is annexed to an estate *for years* in a fine, then it is only a covenant for damages in the personal lien, *Hob. 28. Roll v. Osborn*, which shall bind them, and make them responsible for damages; as well as where such warranty is annexed to the freehold, they shall be bound to warrant, and to answer in value out of their own lands; wherefore he prayed judgment for the plaintiff.

Afterwards at another day in this term, the court, namely, *Twysden*, *Rainsford* and *Morton*, in the absence of *Kelynge* chief justice on account of illness, delivered their opinions; and as to the point of covenant on the warranty, they all thought that the action well lay against the defendant on her warranty in the fine, although she was covert-baron, and they did not make any scruple of it (9). And as to the exception

Baron and feme
join in a fine *sur
concessit*, with
warranty, the

(9) So if husband and wife make a lease for years of the wife's lands by indenture, and she accepts rent after his

death, she is liable to the covenants in the lease. *Cro. Jac. 563, 564. Greenwood v. Tyler*. S. P. agreed by the court and counsel

exception of the insufficiency of the breach assigned, they all held that the breach was not well assigned: and *Twyſden* justice gave the reasons of it, namely, that this was the same case in every circumstance with the case of *Kirby v. Hansaker*, which was of great authority, being adjudged by the whole Exchequer-Chamber on a writ of error; and that it cannot be intended

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baron dies, co-
venant on the
warranty lies
against the feme.

counsel on both sides. 1 Mod. 291. *Wootton v. Hele*. And if a lease be made to husband and wife by indenture, and she agrees to the lease after her husband's death, she will be liable to all the covenants in the indenture which run with the land, such as payment of rent, re-entry, increase of rent *nomine pena*, and the like, which are reserved on the lease and dependent upon it; though she will not be subject to any collateral covenants, such as payment of a sum in gross, or other similar covenants which charge the person and not the land leased. Bro. Covenant 6. Coverture 11. So if husband and wife joined in a lease of the wife's land by indenture for life, or years, rendering rent, and the husband died, and the wife accepted rent, she was bound by the lease at common law; for by the receipt of rent after her husband's death, the lease was affirmed. Bro. Acceptance 6. Rescise 70. Keilw. 10. a. And at this day, if husband and wife join in a lease for life or years of the wife's land by indenture not made pursuant to the statute of 32 H. 8. c. 28. s. 1. hereafter noticed, the wife is at liberty after her husband's death either to affirm it by acceptance of rent, or to avoid it by bringing an ejectment, or action of trespass. 1 Roll. Abr. 329. (Y.) pl. 2. Cro. Jac 563. *Greenwood v. Tyber*. As where by a marriage

settlement an estate was settled to the use of the wife for life, remainder to such persons, and for such estates, as she should by deed or will attested by three witnesses appoint, and for want of such appointment, *reversion to herself in fee*; the husband and wife made a lease of part of the premises to the defendant not executed pursuant to the power, and after her husband's death she received rent from the defendant; it was adjudged that such lease was voidable only by her upon her husband's death, and that her receipt of rent accruing afterwards was a confirmation of it. 7 Term Rep. 478. *Doe v. Weller*. By the before mentioned statute 32 H. 8. c. 28. s. 1. it is enacted, that leases by writing indented under seal for term of years, or life, by any person of full age, having an estate of inheritance in right of his wife, or jointly with his wife, made before coverture or after, shall be good and effectual against the lessor, his wife, and their heirs, and every of them. But it was always held necessary, as well before, as since, the statute of 32 H. 8. c. 28. that a lease by them should be *by deed*; for if it be not, the lease is void, and cannot be affirmed by acceptance of rent by her after her husband's decease; and the reason is because her assent is necessary at the commencement of the

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intended in this case, that *Stowell* had any prior right or title to the lands in question, because the words, *having a right or title*, &c. are directed or governed by the word, *entered*; and *having*, being a participle of the present tense, refers to the same time as the verb refers, to which it is joined: so that the sense is, that *Stowell entered*, and then had a right,

lease, and that can only be *by deed*. Dyer, 91. b. where it is said that this was the common opinion of all the justices at that day. Ibid. 146. b. S. P. Cro. Eliz. 556. *Walsal v. Heath*. Sav. 111. Cro. Jac. 564. *Greenwood v. Tyber*. Still however, if the lessee or any other *plead* a demise by husband and wife, it is not necessary to *plead* it to be *by deed*. 2 Rep. 61. b. *Wiscot's case* Sav. 111. Dyer 91. b. *in marg.* Cro. Eliz. 438. *Bateman v. Allen*. Ibid. 482. *Childes v. Westcot*: or that any *rent* was reserved: Cro. Eliz. 112. *Jackson v. Mordant*. And a lease by husband and wife of the wife's lands, not pursuant to the statute, is a good lease of both during the coverture, and may be pleaded as *their lease*. 2 Rep. 61. b. Sav. 110. though it be without reservation of any rent, for the lease is not void, because the wife after her husband's death may affirm it by bringing an action of waste, or accepting fealty. Hutt. 102. But if the wife disagree to the lease after her husband's death, it will be void as to the wife *ab initio*, and she may plead *non demiserunt*. 3 Rep. 27. b. 28. a. Co. Ent. 712. S. C. 1 Leon. 192. *Thetford v. Thetford*. And it is said to be clearly agreed in all the books, that if the husband *alone* makes a lease of his wife's lands, for years by indenture reserving rent, it is a good lease for the whole term, unless the wife by

some act shews her dissent to it; for if she accepts rent which accrues due after his death, the lease is thereby become absolute and unavoidable. 1 Bac. Abr. 302. 3 Bac. Abr. 305.: and Bro. *Acceptance* 10. *Leases* 24. Cro. Jac. 332. *Jordan v. Wikes*. Co. Litt. 45. b. & Plow. 137. *Browning v. Besson*, are cited as authorities in support of it. But it seems, notwithstanding, to be doubtful, whether this is well warranted, though it is undoubtedly a good lease during the coverture; it is however certain that *all* the above mentioned authorities do not prove the position, as will be best seen on the following examination of them. Bro. *Acceptance* 10. is an abridgement of the year-book 21 H. 7. 38. in which *Conesby* says, that if a lease is made by husband *and wife* of the wife's lands rendering rent, and the wife accepts rent after her husband's death, she has made the lease good. There is no doubt of this, but the material consideration is, that it does not support what it is cited to prove. So in Bro. *Leases* 24. it is laid down, that if a husband seised in right of his wife leases her lands for years, and dies within the term, *the lease by his death is void*; so that this authority is directly contrary to the position it is cited to support. In Co. Litt. 45. b. it is observed that a man, seised in right

right, &c. And as to what is said that the defendant had confessed that *Stowell* had an elder title by pleading over, and traversing the entry of *Stowell*, he said, that the defendant by her plea had not confessed impliedly or otherwise any thing more than the matter which the plaintiff has alleged in his declaration; but he has not alleged that *Stowell* had an elder right or title, and therefore the defendant has not confessed it. And he further said, that the words, *against the form and effect*

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An implied confession by the defendant in his plea does not confess any thing more than what the plaintiff alleges in his declaration.

of his wife, *together with his wife*, may by deed indented make leases for 21 years, or three lives agreeable to the statute 32 H. 8. all which were voidable at the common law. It is true indeed that in Plow. 137. it is said by Gawdy Serjeant *arguendo*, that if a man makes a lease for years of his wife's land, and dies, the lease is not void before entry made by the wife; and this dictum is cited by counsel in argument in 1 Roll. Rep. 400. *Smalman v. Agburrough*. In the case in Cro. Jac. 352. the husband made a lease of his wife's lands for five years in an ejectment for trial of the title, and died before the action was brought, and it was adjudged that, inasmuch as the wife had not entered after her husband's death, the lease was not determined or void after her husband's death, but voidable only. On the other hand, it is said in Bro. *Cui in vitâ* 1. *Acceptance* 1. S. C. that if a lease be made by the husband only, and he dies, and the wife accepts rents, the acceptance does not bind her, for she was not privy. And in Bro. *Barre* 27. it is said, that if the husband alone leases for life, and dies, the wife cannot bring an action of waste, because she is not privy to the lease; and hence it follows, that the wife, by acceptance of rent, where she was not party to the lease, shall not

be bound, if it was a lease for years, but may enter; but if it be a lease for life, she is put to her *cui in vitâ*. F. N. B. 446. 7th edit. but that her acceptance of rent, where she was not a party to the lease, is no bar to the writ; and note the diversity. And in Bro. *Acceptance* 6. it is observed, that if husband and wife join in a lease of the wife's land rendering rent, and the husband dies, and the wife accepts rent, she is bound; but it is otherwise where the husband alone makes a gift, or lease, reserving rent, and dies, and the wife accepts rent, this will not bind her; note a diversity: *quod nullus contradixit*. However it may be urged in support of the position in Bacon, that the proviso in the statute 32 H. 8. c. 28. s. 3. seems rather to prove that before the statute the law was as there stated. Perhaps the cases may be reconciled by distinguishing between leases for lease, and years, that in the former case, as the estate commenced by livery, it can only be avoided by entry; but that in the latter, the lease is absolutely void and determined by his death. Upon the whole however it appears, that the law is not so clearly agreed, as it is said to be in the passage cited out of Bacon's Abridgement. See Harg. Co Litt. 44. a. note (2).

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of the fine and warrant aforesaid, do not imply that *Stowell* had an elder title, &c. for it was only the plaintiff's own conclusion of law from premises which do not warrant it, and therefore the plaintiff mistook the law; for the plaintiff ought not to have made a conclusion in law without shewing to the court the matter of fact, whereby it might appear to the court, whether the law is as the party has taken it to be, or not, which is not done here; and therefore these words, *against the form, &c.* will not help the matter. And he further put this case, that if at the trial of the issue the plaintiff had offered evidence that *Stowell* had a good title to the tenements under the plaintiff himself, and by force thereof had entered, &c. this evidence being within the issue, the jury were bound to find for the plaintiff under peril of an attain; and he asked the counsel, whether the judge on this issue could refuse such evidence; and he said certainly not. And therefore if on such evidence the jury find for the plaintiff, the defendant cannot have an attain, for the finding was according to the evidence, and the evidence well proved the issue. And therefore if the defendant cannot take advantage of the law to aid himself, he will be greatly prejudiced, and yet have no remedy, which would be inconvenient; and therefore he thought that the breach was not well assigned; wherefore the judgment was arrested by the court, and a *nil capiat per billam* awarded against the plaintiff (10).

(10) This case has ever since been considered as a leading authority to shew, that it is necessary, for the reasons here given, that the plaintiff should state in his declaration in some manner, that the person evicting had a lawful title *before or at the time of the date of the grant to the plaintiff*; and that an averment that he had a *lawful title*, without this qualification, is too general, and bad after verdict; for it will be intended that the title of the person entering is derived from the plaintiff himself. But it seems that the plaintiff is under

no necessity of setting out *the title* of the person who entered upon him, because he is a stranger to it; it being considered sufficient to allege generally that he *had a lawful title before, or at the time of the conveyance to the plaintiff*. Thus it is held, that in covenant that the party evicting *had right and title* is well enough in a breach for the entry of a stranger, because the plaintiff knows not his title; but still the plaintiff must say that he had it *before the lease to the plaintiff*, for if it were since it is bad, because it might be from the plaintiff himself.

himself. 1 Show. 70. *Skinner v. Kilbys*. So where in debt on bond to perform covenants, the defendant pleaded the covenants which were on the sale of land to the plaintiff, that he should enjoy it against A. and B. and then averred performance generally; the plaintiff replied that A. and B. *having a right by virtue of a title thereof made to them before the conveyance and covenant to him*, entered upon him, and ousted him: on which the defendant demurred, supposing the breach to be too general without shewing by whom, or by what title, they entered; but the plaintiff being a stranger to the title of A. and B., *Hale C. J.* held it well enough; and though *Twydden J.* doubted at first, yet it was afterwards adjudged for the plaintiff. 2 Lev. 37. *Proffor v. Newton*.

And in covenant on articles, by which the defendant covenanted that the plaintiff should enjoy a close quietly for a year, upon which the plaintiff put in his cattle, and one K. *who had title by virtue of a certain lease to him thereof made before the making of the articles* entered on the plaintiff, and expelled him, and afterwards, to wit, in such a term, &c. brought an action of trespass against him for putting his cattle into the said close, and such proceedings were had that K. recovered against the plaintiff 20l. damages and 17l. costs, whereof the defendant had notice, and so for the not quiet enjoyment the plaintiff broke his covenant; and after verdict for the plaintiff, it was moved in arrest of judgment, that the breach was not well assigned, because it was not shewn what title K. had, and it might be that the title which he had was under the plaintiff himself, and there having

been a suit in which K.'s title appeared, the plaintiff ought to have shewn it, for it was in his own knowledge. But the objection was overruled, for K.'s title could not be supposed to be under the plaintiff, because the declaration was that K. had title by virtue of a demise to him made *before the execution of the articles to the plaintiff*; and were the title derived from whom it might, being *before* the articles made with the plaintiff, the covenant was broken, according to *Proffor* and *Newton's* case, where on a breach assigned as here, judgment was given for the plaintiff, the roll of which was brought into court, and on view of it after several motions judgment was given for the plaintiff. 3 Lev. 325. *Buckly v. Williams*. And it was said by Lord *Hardwicke* that, in an action of covenant for quiet enjoyment, it is sufficient to assign the breach in the words of the covenant, so the plaintiff shews that the title of the evictor was not derived from the plaintiff himself. *Caf. temp. Hardw. 172. Jordan v. Twells*. So where the declaration in covenant stated a lease granted by the defendant to C. under whom the plaintiff derived title by several assignments, in which lease the defendant covenanted for quiet enjoyment, "without the let or interruption of the defendant, his heirs and assigns, or of any other person whomsoever," and then assigned a breach, "that the defendant at the time of making the said indenture of demise, or at any time before or afterwards hitherto had not any right or title whatsoever to make the said lease of the said premises to the said C. nor could the said plaintiff by virtue of the said demise since the
" said

“ said assignment so made to him as
 “ afore said, peaceably and quietly have,
 “ hold, occupy, possess and enjoy the
 “ said demised and assigned premises
 “ or any part thereof; for that one J.
 “ at the time of making the said indenture
 “ of demise, and continually from
 “ thence until and at the time of the
 “ eviction and expulsion herein-after
 “ mentioned, *had lawful right and title*
 “ to the said demised premises, and
 “ *having such lawful right and title*, en-
 “ tered into the said premises upon the
 “ possession of the plaintiff, and ejected,
 “ expelled, put out and removed the
 “ said plaintiff from the possession
 “ thereof, &c.” and upon demurrer it
 was objected that it did not appear in
 the declaration, what right, claim or
 title J. at any time before, or at the
 time he entered, or at any time since,
 had to enter into the demised premises
 upon the possession of the plaintiff, and
 evict, and expel him therefrom. But
 the court over-ruled the objection, and
 held it was sufficient to allege that *at*
the time of the demise to the plaintiff J.
 had lawful right and title to the pre-
 mises, and having such lawful right and
 title entered and evicted him, without
 shewing what title J. had. 4 Term
 Rep. 617. *Foster v. Pierſon*; and the
 same point was afterwards determined.
 8 Term Rep. 281—283. *Hodgſon v.*
Enſt India Company, in which the case
 of *White v. Laver*. Cro. Eliz. 823, was
 over-ruled. See further 2 Show. 425.
 41. *Croſſe v. Young*. 1 Term Rep.
 671. *Lloyd v. Tomkies*. 2 Bos. & Pull.
 14. *Browning v. Wright*, note (b.)
 Jenk. Cent. 340. pl. 45. If a *recovery*
in ejectment be stated in the declaration
 to have been had by the person evicting,

the defendant may nevertheless plead
 that the lessor of the plaintiff, that is,
 the person evicting, was not lawfully en-
 titled and on issue being joined thereon
 may prove that he had no lawful title;
 and this will be a bar to the action.

But it seems not to be necessary in an
 action of covenant for quiet enjoyment,
 to state in the declaration that the plain-
 tiff was evicted *by legal process*. 4 Term
 Rep. 617. 620. *Foster v. Pierſon*;
 though it appears certain that some
 lawful eviction or disturbance must be
 shown if done by a stranger. Hob. 12.
Holder v. Taylor. Cro. Eliz. 914.
Chantflower v. Friſſly. Yelv. 30. S. C.
 Vaugh. 121. *Hayes v. Bickerſaff*. Hob.
 35. *Tisdale v. Effex*. Cro. Jac. 425.
Broking v. Cham. But where the co-
 venant is that the grantee, lessee, &c.
 shall quietly enjoy without the let or
 interruption of the *covenantor himself*,
his heirs, or executors, it is held to be
 a sufficient breach to allege that he, or
 his heir or executors entered, without
 shewing it to be a lawful entry, or set-
 ting forth his title to enter. 2 Roll.
 Rep. 21. *Forte v. Vines*. F. N. B. 342.
 K. 7th edit. Cro. Jac. 383. *Penning v.*
Plat. 1 Roll. Abr. 430. pl. 11. *Core's*
case. Cro. Eliz. 544. S. C. 2 Show.
 425. *Croſſe v. Young*. 1 Term Rep. 671.
Lloyd v. Tomkies. However *some par-*
ticular act must be shewn by which the
 plaintiff is interrupted, for otherwise
 the breach of a covenant or condition for
 quiet enjoyment is not well assigned.
 Com. Rep. 228. *Anon*. 8 Rep. 91. a. b.
Fraunces's case.

But in an action of covenant, *that*
the grantor has good right, full power and
lawful authority to grant, it is held that
 the breach may be as general as the
 covenant.

covenant, namely, *that he had not good right, full power, and lawful authority to grant*, without stating any eviction, or interruption. As where the declaration stated, "that the defendant at the time of making the said indenture, had not full power and lawful authority to demise the premises according to the form and effect of the said indenture;" and after verdict and judgment for the plaintiff, it was assigned for error, that the plaintiff in his declaration had not shewn what person had right, title, estate, or interest in the demised premises at the time of making the indenture, by which it might appear to the court that the defendant had not full power and lawful authority to demise the premises; but it was resolved, that the assignment of the breach of covenant was good, for he has followed the words of the covenant negative, and it lies more properly in the knowledge of the lessor what estate he had in the land which he demised, than of the lessee who was a stranger to it; and therefore the defendant ought to shew what estate he had in the land at the time of the demise made, by which it might appear to the court, that he had full power and lawful authority to demise it. 9 Rep. 60. b. *Bradshaw's case*. Cro. Jac. 304. S. C., the pleadings of which case the reader will find in Co. Ent. 16, 117. 2 Show. 460. *Lancashire v. Glover*. S. P. So where in covenant the declaration stated that the defendant by indenture demised to the plaintiff a messuage and certain land in C. for 60 years, and covenanted that he was then lawfully seised in fee of an indefeasible estate, and assigned a breach that at the time of making the inden-

ture he was not lawfully seised in fee; the defendant pleaded *non est factum*, and after verdict for the plaintiff it was moved in arrest of judgment, that the declaration was not good, because the breach was too general, not shewing that any other was seised, nor any cause why the defendant was not seised; but the objection was disallowed, because as the covenant is general, so the breach may be assigned generally, especially after the plea of *non est factum* which admits the breach, if it had been his deed. Cro. Jac. 369. *Muscot v. Ballet*. So where in debt upon bond, the defendant demanded oyer of the condition which was to perform covenants, one of which was, that the defendant covenanted that he was seised of an indefeasible estate in fee-simple, and the defendant pleaded covenants performed; the plaintiff replied that he was not seised of an indefeasible estate in fee-simple; and the defendant demurred generally, because he supposed that the plaintiff ought to have shewn of what estate the defendant was seised, in regard he had parted with all his writings concerning the land in presumption of law, and therefore the plaintiff well knew the title; and it was not like *Bradshaw's case*, because there the covenant was with the lessee for years who had not the writings. But it was resolved that the breach was well assigned according to the words of the covenant, and judgment was given for the plaintiff. Sir T. Raym. 14. *Glinister v. Audley*. See further on the subject of covenants for quiet enjoyment, Palm. 339. *Butler v. Swinerton*. Doug. 43. *Hurd v. Fletcher*. Com. Rep. 180. *Hammond v. Hill*.

Case 13.

Devereux *versus* Barlow.

Pasch. 21. Car. 2. Regis. Rot. 511.

Lessor refuses to accept an assignee for his tenant, and gives his receipts in lessee's name, and after brings debt against the assignee for rent, and held good, for he may refuse him when he will and accept him when he will, and may sue either the lessee or assignee for the rent at his election.

DEBT for rent. The plaintiff declares that he was seised of a messuage, &c. in fee, and so seised, on the 24th June in the 15th year of the reign of the king, by indenture made between the plaintiff of the one part, and one *Editb Clement* of the other part, (shewn here in court,) he demised to the said *Clement* the said messuage, &c. to have for seven years, yielding the rent of 14l. a year at the four usual feasts by equal payments, by virtue of which lease the said *Clement* entered and was possessed, and that afterwards she granted all her interest to the defendant, who entered and was possessed, and for 7l. for rent arrear for half a year after the assignment to the defendant the action was brought, &c.

The defendant pleads in bar, that from the time of the assignment, and from time to time hitherto the plaintiff has not acknowledged, but has altogether refused the defendant to be his tenant of the said messuage, as by divers acquittances and receipts of rent made in the name of the said *Clement* (and here into court brought) fully appears. And this, &c., wherefore &c. : upon which plea it was demurred in law.

And in this term it was adjudged without difficulty that the plea was bad ; for the plaintiff may refuse to accept the defendant being assignee, to be his tenant at one time, and yet accept him after at any time he pleases ; and for this rent arrear the plaintiff may sue either the said *Clement* the first lessee, or the said defendant being the assignee, at his election ; wherefore it was adjudged for the plaintiff (1).

(1) So in debt for rent, the case on the declaration after verdict appeared to be, that the lessee assigned a moiety of the land for the whole term ; the lessor brought debt against the assignee for a moiety of the rent ; and it was moved in

arrest of judgment that the privity both of estate and contract in this case remained entirely with the lessee, and therefore the assignee of a moiety not chargeable. But, by the whole court, the assignee having the whole estate in the

the moiety of the land, has privity of estate sufficient to be charged by the lessor, if he will, with a moiety of the rent, and gave judgment for the plaintiff. 2 Lev. 231. *Gamon v. Vernon*. Sir *T. Jones*, 104. S. C. or, it is said, the lessor may have a joint action of debt against the lessee and assignee for the

whole rent. Cro. Jac. 411. *Bailiff of Ipswich v. Martin*. And in the case of *Stevenson v. Lambard*. 2 East 575. it was held that an action of covenant lies against the assignee of the lessee for a part of the rent. See 1 Saund. 241. *Thursby v. Plant*, note (5).

• *Furlong versus Bray*.

Case 34.

Hil. 20 & 21 Car. 2. Regis. Rot. 1578.

TRESPASS for an assault, battery and false imprisonment. The defendant pleads to all the trespasss except the imprisonment for the space of 10 days, not guilty; and as to the said imprisonment, that the court of chancery made an order in a cause there depending between one *Bogden* and his wife plaintiffs, and the said *Furlong* the now plaintiff then defendant, that whereas the said *Furlong* was in contempt for not obeying a decree of the court, by which he was to pay the said *Bogden* and his wife 100l., it was thereupon ordered that the said now plaintiff should stand committed to the prison of the Fleet; wherefore the defendant as servant and assistant to *Bold Boughen* then warden of the Fleet, and by his command took the said now plaintiff, and delivered him to the said warden of the Fleet to be imprisoned; wherefore he was imprisoned for the said space of 10 days, which is the same imprisonment whereof the plaintiff has complained against him. And this, &c., wherefore, &c., on which plea the plaintiff demurs in law.

And the exception to the plea was, that neither the defendant, nor the warden of the Fleet, by the said order of chancery, had sufficient warrant or authority to take or imprison the plaintiff without a writ: for it was said that, in pursuance of the said order, there ought to have been a writ awarded out of chancery for the taking of the prisoner, and that such was

S. C. 2 Keb. 711.
1 Mod. 272.
An order of the court of chancery that a party should be committed to the Fleet is not a sufficient authority to imprison him, without a writ awarded out of chancery for that purpose. See *Martin v. Kerridge*, 3 P. Will. 240.

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BRAY.

the course of chancery; and the warden of the Fleet of his own head, or any other by his command, could not take or imprison the plaintiff without such writ; wherefore it was adjudged for the plaintiff.

Case 35.

Roberts *versus* Mariett.

Trin. 22 Car. 2. Regis. Rot. 944.

Debt on bond.

LONDON, to wit. BE it remembered that heretofore, to wit, in the term of St. Hilary last past, before our lord the king at *Westminster* came *Mary Roberts* widow by *Thomas Sturmy* her attorney, and brought here into the court of our said lord the king then there her certain bill against *Thomas Mariett* esq., otherwise called *Thomas Mariett* of *Ascott* in the county of *Gloucester* esq. in the custody of the marshall, &c. of a plea of debt, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit; London, to wit, *Mary Roberts* widow complains of *Thomas Mariett* esq., otherwise called *Thomas Mariett* of *Ascott* in the county of *Gloucester* esq., being in the custody of the marshal of the marshalsea of our lord the king before the king himself, of a plea that he render to her 200l. of lawful money of *England*, which he owes to and unjustly detains from her, for this, to wit, that whereas the said *Thomas*, on the 25th day of *January* in the year of our Lord 1667 at *London*, to wit, in the parish of the blessed *Mary le Bow* in the ward of *Cheap, London*, by his certain writing obligatory sealed with the seal of him the said *Thomas*, and to the court of our lord *Charles* the 2d now king of *England*, &c. here shewn, the date whereof is the day and year abovesaid, acknowledged himself to be held and firmly bound to the aforesaid *Mary* in the said 200l., to be paid to the said *Mary* when he should be thereunto requested, yet the said *Thomas* (although often requested) has not yet paid the said 200l. to the said *Mary*, but to pay the same to her has hitherto altogether refused,

refused, and yet refuses, to the damage of the said *Mary* of 20l. and therefore she brings suit, &c.

ROBERTS v.
MARIETT.

Imparlanca.

And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity* in this same term, until which day the said *Thomas Mariett* had leave to imparl to the said bill, and then to answer, &c. before our lord the king at *Westminster* comes as well the said *Mary* by her attorney aforesaid, as the said *Thomas Mariett* by *John Saunders* his attorney: and the said *Thomas Mariett* defends the wrong and injury when, &c. and prays oyer of the said writing obligatory, and it is read to him, &c.; he also prays oyer of the condition of the said writing obligatory, and it is read to him in these words, to wit; "The condition of this obligation is such, that if the above bounden *Thomas Mariett*, his heirs, executors, administrators, and assigns, and every of them, for his and their part and behalf, shall and do in all things stand to, abide, observe, perform, fulfil and keep the award, doom, determination, final end and judgment of *Henry Killigrew* and *Charles Gibbs*, prebendaries of *Westminster*, and doctors of divinity, arbitrators indifferently nominated, elected and chosen, as well on the part and behalf of the above-named *Thomas Mariett*, as on the part and behalf of the above-named *Mary Roberts*, to award, arbitrate, judge of and determine, of, for, upon and concerning, all and all manner of causes of actions, suits, troubles, debts, reckonings, accompts, sums of money, claims and demands whatsoever, had, made, stirred, moved or depending between the said parties, at any time before the date above-written, so always as that the said award, judgment and determination of the said arbitrators of, for and concerning the premises, be made and put in writing indented under their hands and seals on this side and before the first day of *May* now next coming, and one part thereof delivered or tendered to be delivered to the said *Thomas Mariett*, at or within the now hall of the dean and chapter of *Westminster* aforesaid, situate in *Westminster* aforesaid, between the hours of two and five in the afternoon of the same day, then this obligation to be void, or else it to stand and be in force and virtue." Which being read and heard, he the said *Thomas* says, that the said *Mary* ought not to have or maintain her aforesaid action

Plea.

Defendant prays
oyer of the con-
dition of the
bond, which is

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to perform an
award,

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and pleads that
the arbitrators
did not make any
award.

thereof against him, because he says that the said *Henry Killigrew* and *Charles Gibbs*, the arbitrators in the said condition above mentioned, did not make any award between the said *Thomas Mariett* and the said *Mary Roberts* in the said condition named, according to the form and effect of the said condition. And this he is ready to verify; wherefore he prays judgment if the said *Mary* ought to have or maintain her aforesaid action thereof against him, &c.

Replication.

And the said *Mary Roberts* says that she, by any thing by the said *Thomas Mariett* above in pleading alleged, ought not to be barred from having her aforesaid action thereof against him the said *Thomas*, because she says that the said *Henry Killigrew* and *Charles Gibbs*, the said arbitrators named in the said condition, after the making of the said writing obligatory, and before the said first day of *May* in the said condition likewise mentioned, to wit, on the first day of *February* in the year of our Lord 1667 aforesaid, at *London* aforesaid in the parish and ward aforesaid, having taken upon themselves the burden of arbitrating, ordaining and adjudging of and upon the premises in the said condition above specified between the said *Mary Roberts* and the said *Thomas Mariett*, then and there made their certain award in writing indented under their hands and seals of and upon the premises in the said condition above specified, and by their said award then and there arbitrated, and ordained in manner and form following, that is to say; That the said *Thomas Mariett*, his executors, or administrators should pay to the said *Mary Roberts*, her executors or administrators the sum of 100*l.* of lawful money of *England*, on the 10th day of *June* then next following, at or in the common dining hall of the *Inner Temple, London*, between the hours of two and five in the afternoon of the same day; and as soon as the said *Thomas Mariett*, his executors or administrators should have paid the said sum of 100*l.* to the said *Mary*, her executors or administrators as aforesaid, that she the said *Mary*, her executors or administrators by her or their sufficient deed in writing should remit and release to the said *Thomas Mariett*, his heirs, executors or administrators, all and all manner of actions, cause and causes of actions, suits, bills, writings obligatory, specialties, judgments, executions, extents, quarrels, controversies,

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Sets forth the
award of the
said arbitrators.

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controversies, trespasses, damages and demands whatsoever, at any time before the said 25th day of *January* then last past before the making of the said award, had, made, moved, produced, commenced, sued, prosecuted, committed or depending between the said *Mary Roberts* and *Thomas Mariett*, and on the sealing and execution of such release by the said *Mary Roberts*, her executors or administrators to the said *Thomas Mariett*, his heirs, executors or administrators as aforesaid, he the said *Thomas Mariett*, his executors or administrators, by his or their sufficient deed in writing should remit and release to the said *Mary*, her heirs, executors or administrators, all and all manner of actions, cause and causes of actions, suits, bills, writings obligatory, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever at any time had, made, moved, produced, begun, sued, prosecuted, committed or depending by or between the said parties, or either of them before the said 25th day of *January* then last past before the making of the award. And the said *Mary Roberts* further says, that the said award so in writing indented under the hands and seals of the said arbitrators afterwards, to wit, for the whole time between the hours of two and five in the afternoon of the the said first day of *February*, was ready and tendered to be delivered to the said *Thomas Mariett*, in the said dining hall of the dean and chapter of *Westminster*, situate at *Westminster* aforesaid in the county of *Middlesex*, but neither he, nor any other on his behalf came there to receive the said award. And the said *Mary* further says, that the said award so in writing indented under the hands and seals of the said arbitrators, for the whole time between the hours of two and five in the afternoon of the said first day of *May*, was likewise in the said dining hall of the said dean and chapter of *Westminster* ready and tendered to be delivered to the said *Thomas Mariett*, but neither he, nor any other person on his behalf came there to receive it. And the said *Mary* further says, that although she the said *Mary* from the time of making the said award hitherto has performed, fulfilled and kept all and singular the things in the said award contained on her behalf to be performed, fulfilled and kept according to the form and

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(a) Ante 106.
note (1).

Defendant did
not pay accord-
ing to the award.

Rejoinder.

effect of the said award, and alleging (a) that the said Thomas has not performed, fulfilled or kept any thing in the said award above specified on his behalf to be performed, fulfilled and kept, in fact the said Mary says that the said Thomas did not, before or on the said 10th day of June if the said award above specified, pay to the said Mary the said 100l. according to the form and effect of the said award (1); and this she is ready to verify; wherefore she prays judgment and her debt aforesaid together with her damages on occasion of the detention of the said debt to be adjudged to her, &c.

. And the said Thomas Mariett says, that the said award so in writing indented under the hands and seals of the said arbitrators for the whole time aforesaid between the said hours of two and five in the afternoon of the said 1st day of February was not in the said dining hall of the dean and chapter of Westminster in the said county of Middlesex ready or tendered to be delivered to the said Thomas Mariett; and that the said award so in writing indented under the hands and seals of the said arbitrators for the whole time aforesaid between the hours of two and five in the afternoon of the said 1st day of May in the said condition above specified was not in the said dining-hall of the said dean and chapter of Westminster aforesaid ready, or tendered to be delivered to the said Thomas Mariett as the said Mary has above in replying alleged. And this he is ready to verify; wherefore, as before, he prays judgment, and that the said Mary may be barred from having her aforesaid action thereof against him the said Thomas, &c.

Demurrer.

And the said Mary says that she, by any thing by the said Thomas above in rejoining alleged, ought not to be barred

(1) However, though the time and place for payment of the money awarded be specified in the award, as it is in this case, yet it has been adjudged, that, if the party proceeds to enforce payment *by attachment*, it cannot issue before a *personal demand* of the money has been

made; for the naming of a particular time and place does not supersede the necessity of a personal demand, which is absolutely necessary in order to bring a person into contempt. 1 Bos. & Pull. 394, *Brandon v. Brandon*,

from

from having her said action thereof against him the said *Thomas*, because she says that the plea aforesaid by the said *Thomas* in manner and form aforesaid above in rejoining pleaded, and the matter in the same contained, are not sufficient in law to bar the said *Mary* from having her said action thereof against the said *Thomas*; to which she the said *Mary* has no necessity, nor is bound by the law of the land in any manner to answer. And this she is ready to verify; wherefore for want of a sufficient rejoinder in this behalf the said *Mary* prays judgment, and her debt aforesaid together with the damages on occasion of the detention of the said debt to be adjudged to her, &c.

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And the said *Thomas* says that the plea aforesaid by the said *Thomas* in manner and form aforesaid above in rejoinder pleaded, and the matter in the same contained, are good and sufficient in law to bar the said *Mary* from having her said action thereof against the said *Thomas*, which said plea and the matter in the same contained he the said *Thomas* is ready to verify and prove as the court, &c. and because the said *Mary* does not answer the said plea, nor does hitherto in any wise deny the same, he the said *Thomas*, as before, prays judgment, and that the said *Mary* may be barred from having her said action thereof against him the said *Thomas*, &c. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the said parties, before our lord the king at *Westminster*, until Monday next after three weeks of St. Michael, to hear their judgment of and upon the premises, because the court of our lord the king here is thereof not yet, &c. At which day, before our lord the king at *Westminster* come the parties aforesaid, by their attornies aforesaid, whereupon all and singular the premises aforesaid being seen, and by the court of our said lord the king now here more fully understood, and mature deliberation being thereupon had, for that it seems to the court of our said lord the king now here, that the plea aforesaid by the said *Thomas* in manner and form aforesaid above in rejoining pleaded, and the matter in the same contained, are not sufficient in law to bar the said *Mary* from having her said

Joinder in demurrer.

Curia advisare vult.

Judgment for the plaintiff.

ROBERTS v. MARIETT. said action against the said *Thomas*, it is considered that the said *Mary* recover against the said *Thomas* her debt afore-said, and also 10l. for her damages which she sustained as well on occasion of the detention of that debt, as for the costs and charges by her about her suit in that behalf expended, adjudged to the said *Mary* by the court of our said lord the king now here with her assent. And the said *Thomas* in mercy, (2) &c.

(2) It seems to be now settled, that in debt on bond with a condition for the doing of any thing else but the payment of a gross sum of money, or the appearance of the defendant in a bail-bond, or replevin bond, where the action is brought by the assignee of the sheriff, the plaintiff is bound to suggest breaches on the roll in pursuance of the statute 8 & 9 W. 3. c. 11. s. 8. Thus where in debt on bond for 5000l. conditioned to pay an annuity of 250l. to the plaintiff, on demurrer to the plea, the plaintiff had judgment, and took out execution for 204l. 10s. without suggesting on the roll any breach of the condition; and though it was objected that the legislature did not mean that the statute should extend to a case like that, where the condition was simply for the payment of a certain and precise sum of money, and where there was nothing on which the jury could exercise their judgment, yet the court set aside the execution, saying that it was established by the case of *Collins v. Collins*, 2 Burr. 820. that a bond conditioned for the payment of an annuity was within the statute, and that it was decided in the cases of *Hardy v. Bern*. 5 Term Rep. 540. 636. and *Roles v. Roswell*. Ibid. 538. after great consideration, that the

statute was compulsory, and therefore in all cases within the provision of it the plaintiff must assign breaches on the record; and the court over-ruled the cases of *Howell v. Hanforth*, 2 Bl. Rep. 1016. and *Ogilvie v. Foley*. Ibid. 1111. 8 Term Rep. 126. *Walcot v. Goulding*. So where a bond is conditioned for the payment of a certain sum by instalments, it is within the statute; and therefore if, after judgment obtained upon default of payment of one of the instalments, a subsequent instalment be in arrear, the plaintiff cannot sue out execution for it, though within a year after such judgment, without first suing out a *scire facias* to revive it. 6 East 559. *Willoughby v. Swinton*. So a bond conditioned to perform an award is within the statute. Ibid. 613. *Welch v. Ireland*. Therefore, perhaps, in all cases of actions of debt on bond conditioned for the doing of any thing else but the payment of a gross sum of money, or except debt on a bail-bond, or replevin bond, the best way is to state the whole in the declaration; as in this case, there seems to be no objection to state in the declaration the condition of the bond, the making of the award by the arbitrators according to the condition, and then to assign the breach, “whereby an action has accrued

“ accrued to the said (plaintiff) to
 “ demand and have of the said (defend-
 “ ant) the said 200l. (the sum in the
 “ penalty of the bond) above demanded.
 “ Yet the said (defendant) although
 “ often required, &c.” The only pos-
 sible objection to this mode of declaring
 appears to be, that perhaps the defend-
 ant might be able to plead *nil debet* ;
 but on consideration it seems certain,
 that *nil debet* cannot be pleaded to it,
 any more than to an action upon a *bail-
 bond* by the assignee of the sheriff, in
 which it has been adjudged that *nil debet*
 is no plea : 2 Ld. Raym. 1503. *War-
 ren v. Consett*. 2 Str. 780. S. C. 5 Burr.
 2586. *Hart v. Weston*. S. P. for the
 bond is the *foundation* of the action,
 which is entirely grounded upon it :
 and whenever that is the case, *nil debet*
 is no plea, though facts are mixed with
 it in the declaration. 3 Lev. 170.
Tyndal v Hutchinson. See 1 Saund.
 38. *Jones v. Pope*, and note (3.)
 However, although in debt on a bail
 bond, or replevin bond by the assignee
 of the sheriff, it is not necessary to sug-
 gest breaches pursuant to the statute,
 because the breach is sufficiently stated
 in the declaration, yet it seems that the
 damage, which the plaintiff has actually
 sustained by such breach, must be proved
 at the trial in the same manner as where
 breaches are suggested.

The 8 and 9 W. 3. c. 11. s. 8., and
 the manner of assigning breaches upon
 it, have been already considered pretty
 much at large; see 1 Saund. 58. *Gains-
 ford v. Griffith*, note (1). At that time
 it occurred to the editor, that if the
 plaintiff only stated the bond in his de-
 claration, and the defendant should plead
non est factum, the plaintiff might find

some difficulty in proceeding under the
 statute ; but that doubt has been since
 removed by a decision of the court of
 K. B., in which it is adjudged, that if
 the defendant after oyer of the condition
 plead *non est factum*, the plaintiff may
 suggest breaches on the roll pursuant to
 the statute. In that case, the defendant
 to debt on bond, after craving oyer of
 the condition, by which it appeared that
 it was given for the performance of
 covenants in another deed, pleaded *non
 est factum*, on which issue was joined.
 Afterwards, and before the trial of the
 issue, the plaintiff entered a suggestion
 on the roll pursuant to the statute, set-
 ting forth the above mentioned deed,
 and assigned a breach against the de-
 fendant in not performing the covenants
 in that deed ; after verdict for the plain-
 tiff it was objected, that the statute did
 not warrant entering the suggestion on
 the roll, for it only gives the plaintiff
 the liberty of making such a suggestion
after judgment, and that in three cases
 only, namely, on judgment on demur-
 rer, by confession, or *nil dicit*. But the
 court was clearly of opinion that there
 was no foundation for the objection,
 and that the statute required a liberal
 and beneficial construction, it being
 made in advancement of justice, and in
 ease of defendants ; that it was manifest
 the legislature contemplated cases where
 the plaintiff had not originally assigned
 breaches in his declaration, which the
 statute enabled him to supply by enter-
 ing a suggestion on the record even
 after judgment, and therefore *a fortiori*
 it might be done before. 8 Term Rep.
 255. *Ethersey v. Jackson*. It does not
 appear that this decision turned at all on
 the circumstance of the condition of the
 bond

bond having been set out on oyer, for the reasoning of the court seems to extend to all cases where the defendant pleads *non est factum* to the declaration. If the plaintiff should inadvertently recover a verdict on the issue of *non est factum* without entering a suggestion on the roll, it may be asked, whether he can do so afterwards before judgment? There seems to be no good reason why he should not, because the object and intent of the statute is as much answered, as if the suggestion had been entered before the verdict; and the principle of the above cited case of *Ethersey v. Jackson* seems to warrant the entering of a suggestion at any time *before* judgment? The manner of entering the suggestion may be much in the same way as has been already shewn where there is judgment for the plaintiff on demurrer. 1 Saund. 58. c. 58. d.

Another observation seems to arise out of this statute, namely, that if the plaintiff states in his declaration only so many of the covenants as the defendant has broken, and has judgment, how he is to proceed if the defendant should afterwards be guilty of breaches of other covenants that are not inserted in the declaration. It seems from the words of the statute, that he may in a *scire facias* on the judgment state the other covenants and assign breaches upon them; for the words of the statute, "but in each case the judgment shall notwithstanding remain as a further security, to answer the plaintiff such damages as he may sustain *by further breach of any covenant* contained in the same indenture, upon which the plaintiff may have a *scire facias* upon the said judgment against the defend-

ant suggesting other breaches of the said covenants or agreements," seem to warrant this mode of proceeding. See Tidd's Prac. Forms, 430.

It may not perhaps be unacceptable to give the form of the *poslea* returned by the justices of assize under this statute.

Debt on bond.—Judgment by default, that plaintiffs *ought to* recover the debt, &c. as in 1 vol. 58 d. Then suggest the condition (as in a bastardy bond, for instance) and the breaches.

"And thereupon A. and B. pray the writ of our lord the king to be directed to the sheriff of the county of *Stafford*, to summon a jury to appear before the justices of assize of the county of *Stafford* aforesaid on *Wednesday* the 11th *March* next at *Stafford* in the county aforesaid, to enquire of the truth of the said breach of the said condition, and to assess the damages which the said A. and B. have sustained thereby, and it is granted to them returnable on *Wednesday* next after 15 days from the day of *Easter*, &c. the same day is given to the said A. and B. here, &c. And now here at this day, to wit, on *Wednesday* next after 15 days from the day of *Easter* come the said A. and B. aforesaid by their attorney aforesaid, and the aforesaid justices of the assize of the county of *Stafford* aforesaid, before whom the inquisition aforesaid has been taken, have sent here their record in these words, that is to say,

"Afterwards on the day and year and at the place in that behalf within mentioned, that is to say, on *Wednesday*

“ day the 11th day of *March* in the
 “ 41st year of the reign of our lord the
 “ present king, at *Stafford*, in the coun-
 “ ty of *Stafford*, by virtue of this writ,
 “ before Sir *Giles Rooke* knight, one of
 “ the justices of our lord the king of
 “ the bench, and Sir *Soulden Lawrence*
 “ knight, one of the justices of our lord
 “ the king, assigned to hold pleas before
 “ the king himself, two of the justices
 “ of our said lord the king assigned to
 “ take the assize in and for the within
 “ county of *Stafford* according to the
 “ form of the statute in such case made
 “ and provided, the jurors of the jury
 “ whereof mention is within made
 “ (having been duly summoned in that
 “ behalf by the sheriff of the county
 “ aforesaid) being called, to wit, W. A.,
 “ J. R., S. P., J. J., J. A., W. G.,
 “ G. A., J. S., T. B., J. T., W. S.,
 “ and T. N., come and are sworn upon
 “ the said jury according to the form
 “ of the statute in that case made, and
 “ who upon their oath say that the said
 “ writing obligatory within mentioned
 “ was made with the condition there-
 “ under written and within mentioned
 “ and set forth, and that after the mak-
 “ ing of the said writing obligatory the
 “ said J. H., in the said condition men-
 “ tioned, was delivered of a certain
 “ child, being the child of which she
 “ was pregnant at the time of making
 “ the said writing obligatory, and that
 “ the said child was born a bastard
 “ within the said parish of *Caverswall*

“ within mentioned, and that the said
 “ *George* had not, from time to time,
 “ and at all times after the making of
 “ the said writing obligatory, fully and
 “ clearly indemnified and saved harm-
 “ less the said churchwardens and their
 “ successors, and the parishioners and
 “ inhabitants of the said parish from
 “ all costs and charges by reason of the
 “ birth, education and maintenance of
 “ the said child according to the form
 “ and effect and the true intent and
 “ meaning of the said condition; but
 “ on the contrary thereof had wholly
 “ neglected and omitted so to do, and
 “ the said church-wardens, overseers,
 “ parishioners and inhabitants had on
 “ account of the said neglect and omis-
 “ sion of the said *George*, and in order
 “ to preserve the life and health of the
 “ said child, been obliged to lay out
 “ and expend, and had actually laid
 “ out and expended, a large sum of
 “ money for sundry costs and charges
 “ which were necessarily incurred by
 “ reason of the birth of the said child,
 “ and its education and maintenance
 “ during a long time then elapsed, and
 “ have thereby sustained damages.
 “ And the jurors aforesaid upon their
 “ oath aforesaid do assess the damages
 “ which the said A. and B. have suf-
 “ tained thereby to 9l. 9s. &c. There-
 “ fore,” &c. Judgment for the debt,
 and damages for detention thereof, and
 costs as in the note in the first volume
 page 58 c.

Case 35.

Roberts *versus* Mariett.

Trin. 22 Car. 2. Regis. Rot. 944.

S. C. 1 Mod.
289.

1 Lev. 300.

2 Keb. 614.

702.

If, in debt on bond to perform an award, the defendant pleads no award, and afterwards rejoins that the award was not tendered according to the condition of the bond, it is a departure from the plea.

When after an absolute affirmative the other party makes a direct negative, he ought to conclude to the country.

DEBT on bond, dated 25th *June* 1677, to perform an award by *Roberts* against *Mariett*. The defendant prays oyer of the condition, which was in this manner, namely, “that if the defendant perform the award of *Killigrew* and *Gibbs* doctors of divinity, arbitrators chosen between the parties to determine of, for, upon and concerning all and all manner of causes of actions, suits, troubles, debts, reckonings, accounts, sums of money, claims and demands whatsoever, had, made, stirred, moved, commenced, or depending between the said parties, at any time before the debt above-written, so always as the said award, &c. of the said arbitrators of, for and concerning the premises, be made and put in writing indented under their hands and seals, on this side, and before the 1st day of *May* now next ensuing, and one part thereof delivered or tendered to be delivered to the said *Thomas Mariett* (namely, the defendant) at or within the now dining hall of the dean and chapter of *Westminster*, situate in *Westminster* aforesaid, between the hours of two and five in the afternoon of the same day, then, &c.” And, on oyer of the condition, the defendant pleads that the said arbitrators did not make any award between the parties according to the form and effect of the said condition, and this, &c. wherefore, &c. The plaintiff replies that the said arbitrators before the 1st day of *May* in the condition specified, to wit, on the 1st day of *February* made their certain award in writing indented under their hands and seals of and upon the premises in the said condition above specified, and by their said award did award the defendant to pay a certain sum of money to the plaintiff on a certain day then to come, and that on payment thereof the plaintiff should give the defendant a general release; and the plaintiff further avers that the said award so in writing under the hands and seals of the arbitrators for the whole

time between the hours of two and five in the afternoon of the said 1st day of *February* was ready and tendered to be delivered to the said defendant in the said dining hall, but neither the defendant, nor any other on his behalf came there to receive it; and in the same manner the plaintiff avers the said award to be tendered on the said 1st day of *May*, and then the plaintiff assigns the breach in the non-payment of the money awarded. To which the defendant rejoins and says that the award was not tendered on the said 1st day of *February*, nor on the said first day of *May* in manner and form as the plaintiff has alleged, and this, &c. wherefore, &c. on which rejoinder it was demurred in law.

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And the counsel for the plaintiff took two exceptions to the rejoinder. First, that the rejoinder was a departure from the plea in bar; for in the plea in bar the defendant says that arbitrators made no award, and now in his rejoinder he has impliedly confessed that the arbitrators have made an award, but says that it was not tendered according to the condition, which is a plain departure; for it is one thing not to make an award, and another thing not to tender it when made. And although both these things are necessary by the condition of the bond to bind the defendant to perform the award, yet the defendant ought only to rely upon one or the other by itself, and cannot insist on both matters, for his plea will thereby be double, one of these matters being as sufficient to bar the plaintiff of his action as both together; then when the defendant in his plea has chosen one of the said two matters, namely, that the arbitrators did not make any award, now in his rejoinder he cannot wave this matter of his bar and go to another matter, namely, that the award was not tendered; but if the truth had been, that although the award was made, yet it was not tendered according to the condition, the defendant should have pleaded so at first in his plea, namely, that the award was not tendered as he has said before, and then in his rejoinder he might have maintained his plea by the averment that the award was not tendered according to the condition; but now the defendant has clearly departed from his plea in bar, and pleaded another matter

The rejoinder a
departure from
the plea.

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2. Rejoinder
ought to have
concluded to the
country, and not
with a verifica-
tion.

matter which is not pursuant to the matter of his plea in bar ; and *Keilway* (3) 175. a. was cited to this purpose ; therefore it was concluded that the rejoinder was a departure.

Secondly, it was objected that if the rejoinder had not been a departure, yet it was not good for the bad conclusion of it ; for the plaintiff in his replication has expressly averred that the award was tendered according to the condition, which is a full and absolute affirmative, and the defendant in his rejoinder says that the award was not tendered in manner and form as, &c. which is a flat and direct negative : and therefore the defendant ought to have concluded his rejoinder to the country, for there was a perfect issue between the parties, and not with a conclusion to the court, namely, with an averment of " this he is ready to verify ; " for after the affirmative of the plaintiff, if the defendant,

(3) The case in *Keilway* is this: In debt on bond, *More* for the defendant prayed oyer of the bond and the condition, which was that if the defendant should stand to the award of one A. B. so that the award was made before the feast of *Easter* then next following, then the bond should lose its force ; and pleaded that the arbitrators did not make any award before the said feast ; to which *Pygot* for the plaintiff replied, that the said arbitrator before the said day made an award between the parties, and shewed what it was ; to which *More* rejoined that the arbitrators did not give notice of any award to the defendant before the said feast ; and the opinion of the court was that the rejoinder was a clear departure from the plea, and contrary thereto ; for the plea is that the arbitrators did not make any award, and by the rejoinder the defendant confesses that an award was made before the day, and therefore it

is a departure by the opinion of the whole court. And *More* said that he could not do otherwise than what he had done ; for when the plea was pleaded, the opinion of the court was, that though the arbitrator made an award before the day, but did not give any notice of it to the party, the award was void, to which the court agreed, *quod nota* ; and a void award, and no award, is the same thing, therefore he might by way of rejoinder well shew that the arbitrator did not give any notice to the defendant of the award, in which case the award is void, and so no award in law, and therefore no departure. But the court said it was a clear departure notwithstanding this reason ; for if the matter were so, the defendant ought to have shewn in his plea that he had not notice of it, and so have helped himself at first. M. 7. H. 8. See ante 84. a. *Richards v. Hodges*.

When he has made a full and direct negative, and not by a traverse *absque hoc*, &c. shall not conclude to the country, the matter will never be determined; for by the same reason that the defendant does not conclude to the country by his rejoinder, the plaintiff will not be bound to conclude his surrejoinder to the country, although he does nothing but aver the affirmative pleaded by him before, namely, that the award was tendered in manner and form, &c. and so the defendant may rebut in the negative again without concluding to the country, and the pleading will be infinite without any issue to be tried by the country; which is absurd. And the issue, on the tender of the award, being perfect in the defendant's rejoinder, the not concluding to the country in the rejoinder is matter of substance of which advantage may be taken on a general demurrer; for by the bad conclusion of the said rejoinder the merits of the cause cannot be tried, and consequently cannot appear according to the intent of the statute of special demurrers of 27 Eliz. c. 5. Wherefore he concluded that the rejoinder was bad for this reason also (4).

Baldwin serjeant would have argued for the defendant, but the court would not hear him, but over-ruled him in both points, and ruled that the rejoinder was a departure, and was badly concluded, and therefore insufficient in substance in both points (5). Then he took an exception to the award, for that the arbitrators had awarded that the plaintiff should give a release to the defendant of all *bonds, specialties, judgments, executions, and extents*, which are not submitted to their award, wherefore the plaintiff is not bound to give such release. And besides, nothing is awarded for the plaintiff to do, and so the award is made all of one side, and nothing of the other, wherefore it is void in law, and the plaintiff cannot recover on it.

(4) See 1 Saund. 103. *Hayman v. Gerrard*, note (1.).

(5) However with respect to a wrong conclusion either to the country, or with a verification, it is no longer mat-

ter of substance: for by statute 4 Ann. c. 16. it is reduced to mere form, and must be specially shewn for cause of demurrer.

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Sed non allocatur; for it appears that all debts, sums of money and demands are submitted to arbitration; then if all debts, sums of money and demands are submitted, be they due by bond, judgment, execution or extent, the arbitrators have computed them, and they are within the submission; and therefore as the arbitrators have power to make their award concerning the debts themselves by the submission, so consequently they have power to award the release of specialties, judgments, &c. by which the said debts, sums of money and demands are due, and therefore they have not exceeded their authority. It was also answered by the court, that if the bonds and judgments, &c. were not within the submission, yet the award for any thing which appears to the contrary was good enough, because now they would not intend that there were any bonds or judgments, &c. unless the defendant had shewn it specially which he has not done here; and therefore *quâcunque viâ datâ*, the award for aught that appears is good and sufficient enough: wherefore it was adjudged for the plaintiff by the whole court, except *Kelyngs* chief justice who was absent.

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Case 36.

Mortlake *versus* Charlton, and Sully *versus* Same.

Trin. 22 Car. 2. Regis. Rot. 1401, 1402.

S. C. 1 Mod.

73.
Sir T. Raym.
195.

2 Keb. 706.
In what cases
the defendant, by
pleading a false
deed, or denying
a true deed shall
be fined, or only
amerced.

ERROR on a judgment in debt in an *inferior* court. The error assigned at the bar was, that the plaintiff in the original action had declared in debt on bond, and the defendant had pleaded *non est factum*, and after several continuances the defendant *relictâ verificatione* confessed the action, whereupon judgment was given for the plaintiff, and that the defendant be *in mercy*, whereas it was objected that the judgment ought to have been, "that the defendant, because he denied his own deed, *be taken*." And of this opinion was *Twyfden* justice strongly on the first opening of the case, but he afterwards hesitated; and the parties agreed, as I believe, and no judgment was given.

And the authority of *Beecher's* (b) case was the matter which created the doubt, for that book says positively that in such a case a *capiatur* shall be entered; but this opinion is not warranted by any of the books there cited, namely, 3 Edw. 6, Dy. 67. a. pl. 19. 26 Aff. pl. 5. 33 H. 6. 54. a. 34 H. 6. 20. a.; for the book of 3 Edw. 6. Dy. 67. is no judicial authority, nor is there any judgment there, but the case begins with a "*memorandum that I have seen a record of the bench of Michaelmas term in the 2d year of H. 6. Ro. 134,*" where the defendant pleaded a release made to himself by the plaintiff, (and which was brought into court as must be intended, though the book does not mention it,) on which the parties were at issue, and afterwards *relictâ verificatione* acknowledges that the said release was not the plaintiff's deed, whereupon the plaintiff had judgment to recover, *and the said defendant, because he used the said writing of release which he now confesses to be false, be taken*; so that for any thing that appears this judgment was entered as of course without the knowledge of the judges, and passed *sub silentio*, and never was questioned (c). Yet there is a great difference between the two cases, for there the defendant by shewing a false deed as a true deed under the plaintiff's seal, not only forged, but also published it as a true deed, which he afterwards confessed to be false and counterfeit; and for this great misfeasance he might well be imprisoned, though he afterwards withdrew his plea; but here the defendant only denies his own deed, and afterwards and before the court is troubled to try this false plea, repents and withdraws it, and saves the court and jury the trouble of trying; which is a less offence than if he had forged and published a false deed, though he afterwards confessed it. And this book is the only case which has any colour to maintain the opinion in *Beecher's* case; for the book of 26 Aff. pl. 5. is nothing to the purpose, for there the party denied the deed of his ancestor which was found against him, and a *misericordia* was entered against him, and not a *capiatur*, "*because he denied the deed of another, and not his own.*" And the case of 34 H. 6. 20. is, that the defendant denied his own deed which is found against him by *verdict*, wherefore a *capiatur* was entered against him as it ought, because he denied his own deed, and

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(b) 8 Rep 60. a.

(c) See also
Dy. 67. a. in
margin.

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troubled the court and jury to try it, and was convicted of falsehood by verdict, in which case there is no doubt but he ought to be fined, and a *capiatur* for that purpose ought to be entered against him. And the book of 33 H. 6. 54. b. is an express authority against the opinion in *Beecher's* case; for there the Earl of Oxford brought debt on bond against *Dennis*, who pleaded the plaintiff's release in bar, and issue was joined on *non est factum*, and afterwards, at *Nisi Prius* before *Prisott* chief-justice, the defendant *relictâ verificatione acknowledged the action*, &c.; and afterwards at the day in the bank it was a question, whether the defendant should be fined or amerced; and by *Prisott*, with the advice of the other judges, a *miseri-cordia* was only entered against him, and not a *capiatur*. And the reason was because the judgment was given on the confession and not on the plea, wherefore the denial of his deed was put out of doors as if it never had been pleaded; which case is express in the point of confession after a false plea pleaded before, and was many years after the said precedent of *Dyer* in 2 H. 6.; and now this case agrees with the opinion of *Littleton* 9 Edw. 4. 24. a. b. And the case of *Deviis v. Clerk* (a) is express in the very point by *Fenner* and *Williams* justices: and the reason there given is that the party shall never be fined but where he denies his deed which is given against him, and the jury are troubled with the trial of it; and the judgment was affirmed though the same error was objected as is in this case. And as to the objection made by *Twysden* J. that judgment is given on the plea when it once appears to the court to be false, it was answered at the bar, that if an action of debt be brought on bond, and the defendant plead *non est factum*, to which the plaintiff unadvisedly demurs, and the defendant joins in demurrer, now judgment ought to be given for the defendant; but if the defendant after a continuance and before judgment confesses the action, now judgment shall be given for the plaintiff on the confession of the defendant; but this judgment cannot be said to be given on the defendant's plea, for if it were given on the plea, it would be given for the defendant against the plaintiff, because the demurrer admitted the defendant's plea to be true until the defendant himself had expressly confessed the contrary; wherefore

(a) Cro. Jac.

64.

1 Rol. Abr.

224 (H.) pl. 1.

S. C. Noy. 4.

S. P.

2 Bac. Abr.

514.

4 Bac. Abr. 366.

wherefore it was said that the judgment was solely founded on the confession, and not on the plea; to which no answer was given.

Note; All the prothonotaries of the common bench informed me that in this case the usual course and practice was to enter a *misericordia* and not a *capiatur*; and *Livesay* secondary of this court affirmed the practice here to be accordingly (1), &c.

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v. CHARL-
TON, and
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Same.

(1) The statute 5 W. and M. c. 12. reciting that there were divers actions of trespass, ejectment, assault and false imprisonment brought in the respective courts of law at *Westminster*, and upon judgment entered against the defendant in such actions, the said courts did *ex officio* issue out process against such defendant for a fine to the crown for a breach of the peace thereby committed, which was not ascertained but was usually compounded for a small sum of money by some officer of the said courts, but never estreated into the Exchequer, enacts, that from thenceforth no writ, commonly called *capias pro fine*, in any of the said actions in any of the said courts, shall be sued out against any defendant, or any further process thereupon, but the same fines shall be remitted; yet nevertheless the plaintiff in every such action shall upon signing judgment therein, over and above the usual fees for signing thereof, pay to the proper officer who signs the same, the sum of 6s. & 8d. in satisfaction of the said fine, which officer shall make an increase to the plaintiff of so much in his costs to be taxed against the defendant. Since the passing of this act there can be no *capiatur pro fine* entered in the several actions enu-

merated in it, but the plaintiff is to have 6s. & 8d. in costs to pay so much to the king for the fine. Before this act, when the fine was pardoned, the judgment was entered *nihil de fine quia pardonatur*; and so the practice now is in C. B. upon this statute, the entry there being *nihil de fine quia remittitur per stat*; but in K. B. judgment is entered up without any notice taken of the fine; for the law is altered and taken away in effect by this statute. 1 Salk. 54. *Lindsey v. Clerk*. Carth. 390. S. C. However the case of a verdict and judgment for the plaintiff in debt on bond, to which the defendant pleads *non est factum*, which is found by a jury to be his deed, seems to be omitted out of the statute; and therefore perhaps a *capiatur pro fine* ought still in strictness to be entered in that case. But a mistake in this particular is made no longer material by the statutes 16 and 17 Car. 2. c. 8. and 4 Ann. c. 16. s. 2.; by the former of which it is enacted, that after verdict, confession by *cognovit actionem*, or *relia verificatione*, in any action in any of the courts at *Westminster*, *Chester*, *Lancaster*, *Durham*, or the great sessions in *Wales*, judgment shall not be reversed for want of *misericordia*, or *capiatur*, or by reason

that a *capiatur* is entered for a *miseri-*
cordia, or a *miseriordia* is entered where
 a *capiatur* ought to have been entered;
 and the latter of those statutes extends
 the former to judgments on *nihil dicit*,
 or *non sum informatus*, and upon a writ
 of inquiry of damages executed thereon.

And it has been held that these statutes
 extend to the case of adding a *capiatur*,
 where none lies, though the addition of
 a *capiatur* where neither that, nor a *mi-*
seriordia lies, is not expressly men-
 tioned in the statute¹⁶ and 17 Car. 2.
 1 Str. 313. *Hacket v. Marshall*.

Case 37:

Draper *versus* Blaney executor of Blaney.

Qu. Whether
 a *feri facias* on
 a judgment in
 the court of
 K. B. runs into
Wales, or not.
 S. C. 1 Lev.
 291.
 Sir T. Raym.
 206.
 2 Keb. 649.
 657. 724.

FIERI FACIAS into *Wales*. The plaintiff had recovered a
 judgment in debt in this court against the testator, and
 the action was laid in *London*; and after the death of the testa-
 tor the plaintiff, after judgment in a *scire facias*, sued out a
feri facias to *London*, on which the sheriffs returned *nulla bona*;
 whereupon he sued out a *testatum feri facias* directed to the
 sheriff of *Montgomery* in *Wales* to levy the money recovered
 of the goods of the testator in the hands of the executor;
 on which writ the sheriff made a return in this manner,
 namely, "I Sir Charles Lloyd bart. sheriff of the within men-
 tioned county of *Montgomery* do most humbly certify to our
 lord the king, that the within-specified county of *Montgomery*
 is one of the twelve counties within the principality or domi-
 nion of our said lord the king of *Wales*, where the writ of our
 lord the king not touching the king himself does not run, and
 that it does not appear by the said writ that the said writ does
 in any manner touch our said lord the king, wherefore I most
 humbly implore the advice of the court of our said lord the
 king before the king himself if I can execute the command of
 the said writ. Sir Charles Lloyd bart. sheriff." And on this
 return it was moved for the plaintiff in *Trinity* term last past
 that the sheriff should be amerced, and the plaintiff have a
 new writ. And the court agreed that the sheriff ought to be
 amerced, for the sheriff by his return ought not to dispute the
 jurisdiction of this court, of which he is an officer, as he has
 done here; but if the court has erroneously awarded a process
 which ought not to have been awarded, the sheriff ought to
 obey

obey and execute it, but the party grieved may shew this matter to the court, and pray that they would supersede their erroneous process and so have remedy; wherefore it was awarded that the sheriff should be amerced: but the amercement was not imposed, because the court wished to hear the great question in the case, namely, whether a *feri facias* on a judgment in this court shall run into *Wales* or not. And *Kelynge* chief-justice strongly inclined for the plaintiff that such writ will run into *Wales*; and now it was once argued in this term before *Rainsford* and *Morton* justices, who on hearing the case argued gave a rule that the plaintiff should have a new writ, and the sheriff be amerced; but it being moved again when *Twyssden* justice was present, he inclined strongly that such process would not run into *Wales*, and not satisfied of this point, he adjourned the case over to the next term; and afterwards *nothing further was done* (1). See for this matter the statutes 27 H. 8. c. 26. 34 & 35 H. 8. c. 26. 1 Edw. 6. c. 10. Het. Rep. 18. *Manfer v. Lewis*. Cro. Jac. 484. Sir *John Carew's* case the opinion of *Dodderidge* justice. 2 Bull. 54. *Hall v. Rotherom*. Ibid. 156. *Bedo v. Piper*, that such writ runs into *Wales*: contra *Godb.* 214. see Cro. Car. 34. Ibid. 444. *Gryffyth v. Lewis*. That an *elegit* lies to a county palatine, see 2 Brownl. 208. *Goodyer v. Ince* (2).

DRAPER v.
BLANEY.

(1) But according to Sir *Thomas Raymond's* report of this case (Sir T. Raym. 206.) it was afterwards adjudged an ill return by *Twyssden*, *Rainsford* and *Morton* justices; see 2 Mod. 10. *Whitrong v. Blaney* accord, which was argued in C. B. when *Vaughan* was chief justice, who was of a different opinion, and seems to have been the case in which his arguments concerning process out of the courts at *Westminster* into *Wales*, was intended to have been delivered, if he had lived. *Vaugh.* 395.

(2) See also 1 Lev. 256. *Anon.* Sir T. Raym. 171. *Nedham v. Bennet*. Although this was a question which was

formerly much debated, *Vaugh.* 395, &c. yet it has long since been settled, that execution on a judgment in any of the courts of *Westminster Hall* will run into *Wales*, or the counties palatine, and is now the daily practice. It was also formerly much debated whether a *latitat* would run into *Wales*, and it was once decided that it would not. 1 Will. 193. *Lampley v. Thomas*; but the contrary has been determined since, and it is now become the settled practice to issue writs of *latitat* into *Wales*. *Doug.* 213. *Penry v. Jones*. So a *capias* from the common pleas will run into *Wales*, and this writ is now as usually issued

into *Wales* as to any county in *England*. And it does not depend merely upon the practice; for the statute 13 Geo. 3. c. 51. (the *Welsh* jurisdiction act) seems very clearly to recognise the jurisdiction of *all* the courts in *Westminster Hall* to hold plea and issue mesne process against parties resident in *Wales*.

The words of the 2d section are, "In
" all transitory actions which shall be
" brought in *any* of his Majesty's courts
" of record out of *Wales*, if it shall ap-
" pear that the defendant was resident
" in *Wales* at the time of the service of
" any writ, or other mesne process served
" on him, &c."

Case 38.

Osborne *versus* Wickenden.

Pasch. 22. Car. 2. Regis. Rot. 162.

Declaration in
replevin,

SUSSEX, to wit. *Thomas Wickenden* late of *Hartfield* in the said county, husbandman, was attached to answer *John Osborne* of a plea, wherefore he took four oxen, two heifers and four cows of him the said *John Osborne*, and unjustly detained them against gages and pledges, &c. And whereupon the said *John Osborne* by *John Cowper* his attorney complains that the said *Thomas Wickenden*, on the 20th day of *October* in the 21st year of the reign of our lord *Charles* the 2d now king of *England*, &c. at *Hartfield* aforesaid in the county aforesaid, in a certain close there called the *Mead*, took four oxen, two heifers and four cows of him the said *John Osborne*, and unjustly detained them against sureties and pledges until, &c. Wherefore the said *John Osborne* says that he is injured and has damage to the value of 100l.; and therefore he brings suit, &c.

Defendant
avows for a
rent-charge in
right of his wife.

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And the said *Thomas Wickenden* by *William Waltham* his attorney comes and defends the wrong and injury when &c., and in right of *Anne* now his wife well avows the taking of the said cattle in the said place in which &c., and justly &c. because he says that the said place called the *Mead*, in which the taking of the said cattle is supposed to be made, contains, and, at the said time when the said taking of the said cattle is supposed to be made, did contain in itself 20 acres of land with the appurtenances in *Hartfield* aforesaid, and that long before

before the said time when &c., to wit, on the 17th day of *May* in the year of our Lord 1658, one *John Swaylands*, late of *Hartfield* in the said county of *Sussex* yeoman, in his life time was seised of and in the said 20 acres of land with the appurtenances in *Hartfield* aforesaid (among other things) in his demesne as of fee: and the said *John Swaylands* being so thereof seised, the said *John* afterwards and before the said time when &c., to wit, on the 18th day of *May* in the said year of our Lord 1658, at *Hartfield* aforesaid, made his last will and testament in writing, and thereby gave and devised to the said *Anne*, now the wife of him the said *Thomas*, and sister of the said *John*, then called *Anne Swaylands*, while she was sole, by the name of *Anne* his sister, a certain yearly rent of 12l. of lawful money of *England* to be issuing and going, had and taken, yearly and every year during the natural life of the said *Anne*, out of the said 20 acres of land with the appurtenances in the said parish of *Hartfield* aforesaid, (among other things,) the first payment of the said yearly rent of 12l. to begin on the feast day of *St. Michael the Archangel*, or the annunciation of the blessed *Mary* which should first happen after the death of the said *John*, and so to be paid at two payments by even and equal portions: and if it should happen that the said yearly rent of 12l., or any part or parcel thereof, should be in arrear and unpaid during the natural life of the said *Anne* for the space of 21 days after any of the said feast-days or days of payment in which the same ought to be paid, that then it should and might be lawful to and for the said *Anne* or her assigns to enter into and upon the said 20 acres of land with the appurtenances, (among other things) or into and upon any part or parcel thereof, and to distrain, and the distress and distresses there had and taken lawfully from thence to lead, drive, take and carry away, and them and every of them to detain and keep until the said yearly rent and all arrears thereof, (if any there be) should from time to time be fully satisfied and paid to the said *Anne* or her assigns. And that the said *John Swaylands* by his said last will and testament declared his will and true intent to be, that if the said *Anne* should happen to marry or be married, or if the said *Anne* should require any portion or portions, legacy or legacies

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WICKEN-

J. S. seised of
the locus in quo
in use

by his will de-
vised an annuity
of 12l. a year to
his sister for life
payable thereout,

with a clause of
distress in case of
non-payment.

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If the testator's
sister should
marry, then his
executor should
pay her 100l.
and the yearly
rent should close
and return to
the executor

given

OSBORNE v.
WICKEN-
DEN.

and died.

Defendant and
testator's sister
intermarried.

and because 24l.
of the said an-
nual rent was in
arrear to de-
fendant and his
wife after their
marriage.

given by the father of him the said *John Swaylands*, or by *John Ashdowne* the uncle of him the said *John*, that then the executor of the will of him the said *John* should pay to the said *Anne* 100l., and the said yearly rent of 12l. should entirely cease and return to the said executor of the said *John Swaylands*, and by the said will made and constituted one *Richard Swaylands* brother of the said *John Swaylands* executor of the said will, as by the said last will and testament of the said *John* (among other things) more fully appears; and afterwards, to wit, on the 25th day of *May* in the year of our Lord 1658 aforesaid, at *Hartfield* aforesaid, the said *John Swaylands* died so as aforesaid seised (among other things) of the said 20 acres of land with the appurtenances; after whose death the said *Anne* while she was sole was seised of the said yearly rent in her demesne as of freehold during her life; and the said *Anne* being so thereof seised, she the said *Anne* afterwards, to wit, on the 21st day of *October* in the 14th year of the reign of our said lord the now king, at *Hartfield* aforesaid took to her husband the said *Thomas Wickenden*, whereby the said *Thomas* and *Anne* in right of her the said *Anne* was seised of the yearly rent aforesaid in their demesne as of freehold for the term of the life of the said *Anne*; and the said *Thomas* and *Anne* being so thereof seised, 24l. of the yearly rent aforesaid for two years ended at the feast of *St. Michael the Archangel* in the 16th year of the reign of our said lord the now king, and for the space of 21 days next after the said feast, was in arrear and unpaid to the said *Thomas* and *Anne* after their intermarriage, and because the said 24l. of the yearly rent aforesaid was in arrear to the said *Thomas* and *Anne* in right of her the said *Anne* after their intermarriage, at the said feast of *St. Michael the Archangel* in the 16th year aforesaid, and for the space of 21 days next after the said feast, and at the said time when &c. were unpaid to the said *Thomas* and *Anne* or either of them, he the said *Thomas* in right of her the said *Anne* well avows the taking of the said cattle in the said place in which &c. for the said 24l. of the yearly rent aforesaid, and justly &c. as in parcel of the premises in form aforesaid charged and bound to the distress of the said *Anne* &c. With this that the said *Thomas* will

will verify that the said *Richard Swayslands*, executor of the will of the said *John Swayslands*, has not paid to the said *Thomas* and *Anne*, or either of them, the said 100l. so as aforesaid mentioned in the said will of the said *John Swayslands*, according to the form and effect of the said will; and that the said *Anne* at the said time when &c., was and still is in full life, to wit, at *Hartfield* aforesaid. And this he is ready to verify. Wherefore he prays judgment and a return of the said cattle together with his damages, costs and charges by him about his suit in this behalf expended, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

And the said *John Osborne* says that, by any thing by the said *Thomas Wickenden* above in pledging alleged, he the said *Thomas Wickenden* ought not to acknowledge the taking of the said cattle in the said place in which &c. to be just, because he says that the plea aforesaid by the said *Thomas* in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law to maintain his having a return of the said cattle, to which he the said *John Osborne* has no necessity nor is bound by the law of the land in any wise to answer; and this he is ready to verify; wherefore for want of a sufficient avowry in this behalf he the said *John Osborne* prays judgment and his damages on occasion of the said taking, and unjustly detaining of the said cattle to be adjudged to him, &c.

And the said *John Wickenden* says that the said plea by him the said *Thomas* in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in law to maintain his having a return of the said cattle, which said plea and the matter in the same contained he the said *Thomas* is ready to verify and prove as the court, &c. and because the said *John* does not answer the said plea nor has hitherto in any wise denied the same, he the said *Thomas*, as before, prays judgment and a return of the said cattle together with his damages, costs and charges aforesaid by him, about his suit in this behalf expended, according to the form of the said statute to be adjudged to him,

&c.

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WICKEN-
DEN.

Averment that
the executor has
not paid the
100l.
and defendant's
wife is living.

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Demurrer.

Joinder.

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DEN.

*Curia advisare
vult.*

&c. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the parties aforesaid before our lord the king on the morrow of the *Holy Trinity* wheresoever, &c. to hear their judgment of and upon the premises, because the court of our said lord the king now here is therefore not yet, &c.

Case 38.

Osborne *versus* Wickenden.

Pasch. 20 Car. 2. Regis. Rot. 162.

A man devises a rent-charge to his sister for life, and if she marries, that his executor pay her 100l. and the rent shall cease, and return to the executor, held that the rent-charge shall not cease till the 100l. be paid.
S. C. 1 Mod. 272, 273.
2 Keb. 112.

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REPLEVIN by *Osborne* against *Wickenden*. The defendant in right of *Anne* his wife makes avowry for the arrears of a rent-charge: and on the avowry, to which the plaintiff demurs, the case appeared to be this, namely; That one *John Swaylands* being seised in his demesne as of fee of the place in which, &c. by his last will in writing devised to the said *Anne* (while she was sole) a rent of 12l. a year to be issuing out of the place in which, &c. during her natural life, with a clause of distress, but if it should happen that the said *Anne* should marry, then his executor should pay 100l. to the said *Anne*, and the said yearly rent should cease and return to the said executor of the deviser, who was one *Richard Swaylands*; and afterwards the deviser died, and *Anne* took the avowant to her husband, and the 100l. was not paid after the marriage, wherefore he distrained, and avowed for all the rent arrear after the marriage; and the question was, whether by the marriage the yearly rent should cease *ipso facto*, or until the 100l. should be paid.

And *Jones* for the plaintiff argued that the rent should cease by the marriage *ipso facto*, although the 100l. was not paid; for he said, that the words of the will were express, that if *Anne* should marry then the rent should cease, and the executor should pay her 100l., therefore the marriage makes the rent to cease; for though the words of the will are placed

placed in this manner, namely, that if she marry then the executor should pay 100l. and the rent shall cease, yet the sense is no other than as he had expressed it. And he further said that *Anne* the devisee had a remedy for the 100l. and therefore could not have the rent also; for if the rent should be now recovered by this avowry, yet the avowant and the devisee his wife by virtue of the will might sue the executor in the spiritual court and recover the legacy of 100l. which was the intent of the deviser; for he intended that the devisee after her marriage should have only the 100l. and not have any more rent after the marriage. And he put the case, that if the devisee had after making the will married in the life-time of the deviser, she would not have had the rent after the death of the deviser, although the 100l. was not paid; yet she might have recovered the 100l. by a suit in the spiritual court as a legacy; and so she may in the present case; wherefore he concluded for the plaintiff that the rent ceased by the marriage only without actual payment of the legacy of 100l.: and of this opinion was *Twysden* justice strongly.

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WICKEN-
DON.

Brewer of *Gray's Inn* and *Saunders* argued for the avowant, that the rent did not cease by the marriage without actual payment of the 100l.; for the intent of the deviser appeared to them to be plain, that *Anne* the devisee should have either the rent for her life, or else, if she married, the 100l. in lieu of the rent; and the words of the will are, that if she married, then the executor should pay her the 100l. and the rent should cease, so that the payment of the 100l. and the ceasing of the rent are conjoined by the deviser in his will. But the plaintiff would sever them by his construction, and say that the rent should cease, but the 100l. not be paid; so that where the deviser intended that the devisee should have the rent or the 100l. it might happen, according to the plaintiff's construction, that the devisee should neither have the one nor the other; for perhaps the executor has no assets, and then how can the avowant and the devisee his wife recover the 100l.? But if the executor has assets yet the intent of the deviser was not that the devisee should lose his rent before he has

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received

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WICKEN-
DEN.

(a) Postea 388.
d. sect. 2.

received the 100l. and therefore the clause of payment of the 100l. is placed before the clause of the ceasing of the rent; and the rent was intended to be in nature of a security for the 100l. after marriage, and therefore it should not cease till the 100l. were paid. And it was further said that if the executor has not any assets and therefore not bound to pay the 100l. yet if he will pay the 100l. out of his own money, he may well do so, and the rent shall cease; which proves, as it was urged, that the intention of the devisor was not that the 100l. should be paid as a legacy out of his personal estate, but that he intended it as a recompence for the rent, without which recompence, whether he had a personal estate or not, he did not mean that the devisee should lose the rent, though she married. And in this case the executor is as a mere purchaser; for the will is that, on payment of the 100l., the rent should cease and return to the executor, so that the executor is to have the rent for the life of the devisee, by way of *executory devise*, (a) on payment of the 100l. and therefore if he pays the 100l. he is to have an estate for his money; but by the construction which the plaintiff wishes to put on the will, the executor will be a purchaser to have the estate, but will pay nothing for it, which is directly against the will of the devisor, who never intended any such thing. And as to the objection that if the devisee had married in the lifetime of the devisor she would not have had the rent, it was answered that if it had so happened it is true that she would not have had the rent, because it could not vest in the devisee in the lifetime of the devisor, but her marriage, which had been the devisee's own act and folly to destroy her security, had prevented the vesting of it at all in the devisee, and then there would be no necessity to pay the 100l. in order to divest an estate which was never vested. But it is otherwise in the present case: the rent was once vested, and therefore there is no reason why it should be divested without the payment of the 100l. contrary to the intent of the will and of the devisor, where the devisee has not committed any act to destroy such intent; wherefore they concluded for the avowant that the rent did not
cease

cease by the marriage until the actual payment of the
 100l.

And of this opinion were *Rainsford* and *Morton* justices,
 wherefore they gave judgment for the avowant against the
 opinion of *Twyfden*.

Goram v. Sweeting, The Same v. Fowke, and
 The Same v. Bateman.

Case 39.

Mich. 22 Car. 2. Regis. Rot. 367.

LONDON, to wit, Be it remembered that heretofore, to wit,
 in the term of the *Holy Trinity* last past, before our lord
 the king at *Westminster* came *Francis Goram* by *Andrew*
Viduan his attorney, and brought here into the court of our
 said lord the king then there his certain bill against *John*
Sweeting, in the custody of the marshal, &c. of a plea of
 trespass on the case, and there are pledges of prosecution, to
 wit, *John Doe* and *Richard Roe*, which said bill follows in these
 words, to wit: *London*, to wit, *Francis Goram* complains of *John*
Sweeting, being in the custody of the marshal of the mar-
 shalsea of our lord the king before the king himself, for that
 whereas the said *Francis*, on the 21st day of *April* in the year
 of our Lord 1669, at *London* aforesaid, to wit, in the parish
 of *St. Mary le Bow* in the ward of *Cheap*, according to the
 custom of merchants caused to be written and made a certain
 writing, commonly called a policy of insurance (1), in which
 said

(1) Which is, when a merchant
 gives a consideration in money, by way
 of premium, to others, to assure his
 ship or goods, from one port or place,
 to some other port or places, on such
 terms as they can agree upon; and if
 the ship or goods &c. perish, or are lost,
 in the whole, or in part, every sub-

scriber is to make a recompense either
 to the extent of his subscription, or *pro*
rata, in proportion thereto; whereby
 (to use the language of the statute
 43 Eliz. c. 12.) “on the loss or perish-
 “ing of any ship, there followeth not
 “the undoing of any man, but the loss
 “lighteth rather easily upon many, than
 “heavily

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saïd writing it was mentioned that the saïd *Francis Goram* did make an assurance, and cause himself to be assured, *lost* (2) *or not lost*, from *London* to any ports and places out of the streights of *Gibraltar*, at, to, and again, up and down from port to port, and from place to place in trade, and at (3) and from thence to *London*, upon the body, tackle, apparel, ordnance,

“heavily upon few.” A policy of insurance is considered as a contract *uberrimæ fidei*, and always receives a liberal construction, for the benefit of trade, and of the assured. 1 Burr. 349. *Pelly v. Royal Exchange Assurance*. 1 Bos. & Pul. 322. *Wolff v. Horncafile*. Skinn. 55. *Kaines v. Knightly*. And it is held, that what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it was expressed therein. 1 Burr. 350.; and that whoever subscribes or underwrites a policy is bound to know the nature and peculiar circumstances of that branch of trade to which the policy relates, and that whether it is recently established, or not. Doug. 510. *Noble v. Kennoway*. 3d edit. 3 Burr. 1712. *Salvador v. Hopkins*. If there has been a mistake in a policy, it may be altered by consent even after a loss has happened; as where a broker had instructions to insure goods on the ship A., where B. was commander, and the policy by mistake of the person who effected it, was on the ship C. where D. was commander, it was held that the mistake might be set right at the trial, by the evidence of the person in whom the mistake originated. 2 Salk. 414. *Bates*

v. Grabham. 1 Atk. 545. *Molteux v. London Assurance Company*.

It is essential that, in all contracts of insurance, the greatest good faith should be observed by the assurer and the assured towards each other; for fraud; or a concealment, or misrepresentation, of any material circumstance, makes the whole contract void. As if the assurer insures a ship on her voyage, which he privately knows to be arrived; the policy is void, and the assured may bring an action against him to recover back the premium. 3 Burr. 1909. *Carter v. Boehm*. So if the assured conceals any material fact which relates to the ship or goods insured, the policy is void, and the assurer not liable. 1 Black. Rep. 593. *Carter v. Boehm*. 3 Burr. 1905. S. C. 7 Term Rep. 162. *Middlewood v. Blakes*. S. P., though the concealment is not made with a fraudulent intention, but arises from the mistake or negligence of the assured, or his agent. 1 Black. Rep. 593. *Carter v. Boehm*. 1 Bos. & Pull. New Rep. 14. *Willes v. Glover*. But see 4 East, 590. *Haywood v. Rodgers*. And 7 East, 457. *Freeland v. Glover*, 1 Bos. & Pull. New Rep. 151. *Littledale v. Dixon*. Indeed the concealment of material circumstances is held to vitiate all contracts upon the principles of natural law. A

nance, ammunition, artillery, boat and other *furniture* (4) of and in the good ship called the *Margaret* of *London*, of a hundred and fifty tons or thereabouts, whereof was master under God for that voyage *Henry Fairweather*, or whosoever else should go master in the said ship, or by whatsoever other name or names the said ship or the master thereof was or should

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man who is kept ignorant of any material ingredient may safely say, that it is not his contract; *non hæc in jactura veni* 1 Black Rep. 65. *Hodgson v. Richardson*, per Yates, J.

If the mere concealment, or suppression of facts, is attended with such an effect on the contract, it follows as a still stronger consequence, that the suggestion or allegation of circumstances, which the assured knows at the time to be *false*, must vitiate the policy upon the principles of *moral* law; for no one shall be permitted to derive any benefit from his own falsehood or fraud. A misrepresentation of a *material* fact, by the assured or his agent, though made *innocently*, through inadvertence, mistake, or negligence, without any fraudulent intention whatever, is held to vitiate the policy and discharge the assurer, as much as if there had been an actual fraud; with this difference indeed, that in all cases where an actual fraud has been committed by the assured, or his agent, the underwriter is allowed to retain the premium; but where the misrepresentation arose from mistake, he cannot do so. And the reason, why the policy in both cases is avoided, seems to be, because the assurer computed his risk upon information which was equally false, whether the misrepresentation arose

from mistake, or from fraud and design. And it is held, that it is no answer to shew that the loss was occasioned in a manner not affected by the misrepresentation. 1 Black. Rep. 593, 594. Doug. 250. *Macdowell v. Fraser*. 3d edit. 1 Term Rep. 12. *Fitzherbert v. Maithers*. So a false representation made to the first underwriter in a point that is material, is considered as a misrepresentation made to every one of the underwriters; as if the assured, having notice that a ship was lost, should say she was safe, this would affect the policy with regard to all the subsequent underwriters; for they are presumed to follow the first. Cowp. 789. *Pawson v. Watson*. Doug. 306. *Barber v. Fletcher*. 3d edit. S. P. 3 East, 573. *Marsden v. Reid*.

But there is a distinction between a representation and a *warranty*. The latter is a condition or contingency which is inserted in, and makes part of, the policy itself, or, at least, must be written on the margin of it. Doug. 11. *Bean v. Stupart*, and note (4.) 1 Term Rep. 343. *De Hahn v. Hartley*; as where a ship is warranted to depart with convoy—to sail on or before a particular day—that she is neutral—shall have a certain number of guns, or of men—shall be copper-sheathed,

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should be named (5) or called, beginning the adventure upon the said ship from and immediately following the day of the date of the said writing, and so should continue and endure, until the said ship should be arrived at any ports and places whatsoever out of the streights of *Gibraltar*, and during the whole time of her abode and mooring there (6) at, to and again,

or the like. It is held, that a warranty must be *literally and strictly performed*, and nothing *tantamount* is sufficient, and it is immaterial for what purpose the warranty was introduced, or whether the party had any view at all in introducing it; for the meaning of a warranty is to preclude all inquiries into the materiality or substantial performance of it. Cowp. 785. *Pawson v. Watson*. 1 Term Rep. 345, 346. *De Hahn v. Hartley*. *Tabbs v. Bendelack*, by Lord Kenyon, cited in 3 Bos. & Pull. 207. note. 2 Bos. & Pull. 164. *Anderson v. Pitcher*. Thus where a ship is warranted to sail on the 1st of *August*, if she does not sail until the 2d, though for the best reasons in the world, the warranty is not complied with, and the assurer is discharged. So it is if the warranty be to sail after a particular day, and the ship sails before. 1 Term Rep. 345. Doug. 12. note (4.) *Kenyon v. Berthon*. Cowp. 606, 607. *Bond v. Nutt*. Ibid. 784. *Hore v. Whitmore*. But see 6 East, 382. *Le Mesurier v. Vaughan*. But a representation is only a state of the case, and not a part of the written instrument, but collateral to it, and intirely independent of it; and it is enough that a representation be *substantially* performed, though, as it has been already observed, if it be false in a *ma-*

terial point, it will avoid the policy. Cowp. 785. *Pawson v. Watson*.

There is also a tacit condition, or implied warranty, in all contracts of insurance, that the ship insured is tight, staunch and strong, that is, is sea-worthy, otherwise the policy is void: though it is not necessary that the assured should disclose it to the underwriter, unless information on the subject be particularly called for; and then the assured must disclose truly what he knows in the respect required. 4 East, 550. *Haywood v. Rodgers*. But it is sufficient if she be sea-worthy at the time of her sailing; she may cease to be so in 24 hours after her departure, and yet the underwriter will continue liable. Doug. 735. *Edin v. Parkison*. 3d edit. Ibid. 789. *Fermon v. Woodbridge*. So the insured are not intitled to recover, unless they equip the ship with every thing necessary to her navigation during the voyage; the ship herself must not only be sea-worthy, but she must have a sufficient crew, and a captain, and pilot of competent skill. 7 Term Rep. 161. *Law v. Hollingworth*, per Lord Kenyon.

An assurance cannot be effected on a voyage prohibited by the common law. Thus if an insurance be made on goods shipped on board even a neutral vessel at an enemy's port, to be brought from

again, up and down, from port to port, and from place to place in trade, upon the ship, &c. And further, until the said ship with all her tackle, apparel, &c. should be arrived at *London* and there moored at anchor 24 hours in good safety (7). And it was agreed by the said writing that the said ship, &c., for so much thereof as concerned the assured,

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was

from thence to this country, for the benefit of a subject of this country, the insurance is void; for it has been adjudged, that trading with an enemy, without the king's licence, is illegal; and that it is not lawful for a subject in time of war without the king's licence to bring, even in a neutral ship, goods from an enemy's port, which were purchased by his agent resident in the enemy's country, after the commencement of hostilities, although it may not appear that they were purchased of an enemy, and therefore a policy of insurance on such goods is illegal and void. 8 Term Rep. 548. *Potts v. Bell*, and the case of *Bell v. Gillson*. 1 Bos. & Pull. 345. was over-ruled. See also *Vandyck v. Whitmore*, 1 East, 475. and 8 East, 273. *Kensington v. Inglis*. It had been before decided, that to insure an enemy's property was illegal. 6 Term Rep. 23. *Brandon v. Nesbitt*. Ibid. 35. *Bristow v. Towers*. So an insurance on a voyage prohibited by the statute law of this country is illegal and void. Doug. 254. *Johnson v. Sutton*. 3d edit. 7 East, 449. *Lubbock v. Potts*, 3 Bos. & Pull. 604. *Chalmers v. Bell*. And by statute 38 Geo 3. c. 76. s. 4. policies of insurance effected on ships and goods belonging to his Majesty's subjects, that shall sail without convoy, or shall desert such convoy, are made

null and void. What kind of ships this act applies to may be seen in 2 Bos. & Pull. 210. *Long v. Duff*. Neither can any insurance be effected upon goods prohibited by law from being imported or exported; see statutes 4 and 5 W. and M. c. 15. s. 14, 15, 16. 8 and 9 W. 3. c. 36. s. 1. 12 Geo. 2. c. 25. s. 29, 30, 31. 33. 28 Geo. 3. c. 38. s. 45, 46. 12 Car. 2. c. 18. s. 1. So an insurance upon any goods, the exportation or importation of which is forbidden by the king's proclamation in time of war, is equally void, as if prohibited by statute. *Delmada v. Motheux*, cited in Park's Insur. 234. 254.

The form of the policy recited in this entry is of very ancient date, and the same with that which is in use at this day, except the memorandum now added at the foot of the policy, which will be hereafter noticed, and the words "as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all," which are now inserted in the beginning of the policy. It is not ascertained at what precise period these latter words were first inserted, though they were certainly used some years before the statute 25 Geo. 3. c. 44. with the addition of the words, "as interest may appear." 1 Bos. & Pull.

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was and should be at all times during the said voyage rated and valued at the full sum of 3000. sterling without any further account to be rendered for the (8) same. Touching the adventures and perils which they the assurers were contented to bear and did take upon them in that voyage, they were of the seas (9), men of war, fire, enemies, pirates, rovers, thieves,

Pull 320. *Wolff v. Horncastle*, per Buller J. Previous to that statute, it was complained of as a great grievance, that policies were often effected in *blank*, as it was called, that is, without specifying the *names* of the persons for whose use and benefit, or on whose account, such insurances were made, so that no judgment could be formed of the character of the persons interested in the risk; therefore it was enacted by that statute, that where policies were made by persons residing in *Great Britain*, the names of the persons interested, should be inserted therein, or the names of the persons who should effect the same as agents for the persons interested, and in case of persons residing out of *Great Britain*, the name of the agent. But it having been found by experience, as the preamble of the statute 28 Geo. 3. c. 56. recites, that great mischiefs and inconveniencies had arisen from the effect of the said statute of 25 Geo. 3. it was repealed by the statute of 28 Geo. 3.: but still it was not conceived expedient to allow of policies in blank, therefore the last mentioned statute enacts, that it shall not be lawful for any person to effect any policy of assurance upon any ship, or goods, without first inserting in such policy the name or usual firm of one or

more of the persons interested in such assurance; or without, instead thereof, first inserting the name, or usual firm of the consignee, or consignee of the goods insured, or the name, or usual firm of the person residing in *Great Britain*, who should receive the order for, and effect, such policy, or of the person who should give the order to the agent immediately employed to effect the policy. It is held that this statute must receive a liberal construction. See 1 Bos. & Pull. 316. *Wolff v. Horncastle*. Ibid. 345. *Bell v. Gilson*, and *De Vignier v. Swanston* there cited.

(2) If the words, "lost or not lost," are inserted in the policy, the underwriter is liable, though the ship should be lost at the time of the insurance; but the premium is always in proportion to the probability or improbability of the safety of the ship; it is however sometimes the practice to restrain the general operation of these words, by warranting the ship to be well on a particular day; yet even there it is holden, that if the ship be well on any part of that day, though she is lost before the policy is effected, the underwriter is liable. 3 Term Rep. 360. *Blackburn v. Cockell*. But if these words are not inserted in the policy, and the ship was lost at the time of the insurance, the policy

thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea (10), arrests, restraints and detainments of all kings (11), princes, and people (12), of whatever nation, condition or quality soever, barratry (13) of the master and mariners, and of all other perils (14), losses and misfortunes that had or should come to the hurt, detriment or damage

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policy is void, though the assured did not know it. 1 Show. 324. *Jefferyes v. Legendra*. 5 Burr. 2803, 2804. *Earl of March v. Pigot*. And though the words, "lost or not lost," are inserted in the policy, yet if the assured knew, at the time of making the insurance, that the ship was lost, this fraud will avoid the policy. 1 Show. 324. 5 Burr. 2803.

(3) Though the insurance here is only *from London* to any ports in, &c. yet it is *at* and from thence to *London*; because, as the voyage insured was from *London* to certain places beyond sea, and from thence back again to *London*, the risk continued from the time the ship sailed from *London*, during the whole voyage, as well whilst she remained *at* any place, as whilst she was proceeding on her voyage; and the assurer would be liable for any loss or damage which the ship should sustain *at* any of the places during the voyage: but if the ship had in this case taken fire, and been burnt, while she remained *in London*, and before she broke ground, the assurers would not have been liable, because the risk or adventure did not begin till the vessel was gone from the first port. However, it is now usual to insert, in the policy, the words, *at and from her loading port*, as *at and from London* to any place abroad; in which

case, if any misfortune happens to the ship or cargo during the time the ship remains at her loading port, the assurers are answerable for it. As if the ship is burnt at her loading port: or if she is detained there by an embargo laid upon her and her stores, and thereby prevented from pursuing her voyage. 6 Term Rep. 413. *Rotch v. Edie*. See 4 East, 130. *Robertson v. French*. And if the policy contains *one entire contract for one entire voyage*, it is holden that the underwriters shall not return any part of the premium, though the ship should afterwards make a deviation from the voyage insured, and thereby discharge the underwriters from their liability under the policy; it being a rule that whenever the risk is begun, there shall be no return of premium. Doug. 780. *Bermon v. Woodbridge*. 3d edit. S. P. Cowp. 666. *Tyrie v. Fletcher*. Doug. 585. *Lorraine v. Tomlinson*. Park's Insur. 389. *Meyer v. Gregson*. • Indeed if the policy contains two distinct risks and two voyages, and one risk only has begun, there shall be an apportionment of the premium. 3 Burr. 1237. *Stevensen v. Snow*. 1 Black. Rep. 315. 318. S. C. 1 Bos. & Pull. 172. *Rothwell v. Cooke*

So if the jury find an usage to divide and apportion the premium, and also fix and ascertain how much of the premium

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damage of the said ship, tackle, &c. or any part thereof; and in case of any loss or misfortune it should be lawful to the assureds, their factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said ship, &c. or any part thereof, without prejudice to that assurance, to the charges whereof they the assurers

mium it is usual for the assurers to return on that particular voyage, the court will act upon the usage, because it obviates all the difficulties and inconveniencies which would otherwise result from apportioning the premium. Park's Insur. 390. *Long v. Allen*. But if the jury cannot ascertain the quantum of the premium to be returned, the court cannot act upon it. 3 Burr. 1237. *Stevenson v. Snow*.

But if a ship is insured "at and from A. to B.," and there is any illegality in the traffic during her stay at A., the assured cannot recover on the policy for a loss happening between A. and B. 8 Term Rep. 562. *Bird v. Appleton*.

(4) It has been adjudged that *provisions*, sent out in a ship for the use of the crew, are protected by a policy of assurance *on the ship and furniture*. 4. Term Rep. 200. *Brough v. Whitmore*.

(5) The usual form of the policy is to insert the name of the ship, and of the master, with an addition of the words, "or whosoever else shall go for master in the said ship," as is done here. See *Le Mesurier v. Vaughan*. 6 East. 382. and *Dawson v. Atty*. 7 East, 367. But a policy may also be effected generally "upon ship or ships," effected from any particular place. 2 H. Black. 343. *Kewley v. Ryan*.

(6) If a loss or damage happens to any of the ship's sails, rigging and furniture, during the voyage, at any port or place mentioned in the policy, by any of the perils insured against, though the accident, strictly speaking, happened *on land*, and not on board the ship, yet if it is the usual and well known course of that voyage, to take out of the ship her sails, and to unrig her at such port or place for the purpose of repairing and preserving them till the ship is cleaned and refitted, and to put the sails and rigging into a place built for that purpose, and they are burnt there, the underwriter is as much liable for this loss, as if it had happened on board the ship. For the insurer, in estimating the price at which he is willing to indemnify the trader against all risks, is supposed to take into his consideration, at the time of his underwriting the policy, the nature of the voyage to be performed, and the usual course and manner of doing it. 1 Burr. 341. *Pelly v. Governor and Company of the Royal Exchange Assurance*. 2 Salk. 445. *Bond v. Gonfales*. S. P. So if goods are insured on board one ship to a port, and from thence on board another ship, the first that can be got, the insurance extends through all the intermediate steps of removing from one ship to the other, as usual; for the means must

assurers would contribute each one according to the rate and quantity of his sum therein assured, and that that writing, or policy of assurance, should be of as much force and effect, as the surest writing or policy of assurance theretofore made in *Lombard Street*, or the *Royal Exchange*; and so they the assurers were contented, and did thereby promise and bind

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must be taken to be insured as well as the ends. *Tiernay v. Etherington*, cited in 1 Burr. 348.

But this is confined to losses happening to the ship or goods in the usual course of the voyage. For if there be a *deviation*, as it is called, that is, if there be a *wilful* departure out of the regular and usual course of the voyage insured, without any necessity or reasonable cause, the voyage is determined, and the assurer is discharged from any responsibility. For in that case, the party contracting has voluntarily substituted another voyage for that which has been insured. *Doug. 291. Lavabre v. Wilson*. And it is not material whether the loss was occasioned by the deviation or not, or whether the assured consented to it, or not. 7 Bro. Parl. Cas. 459. *Elliot v. Wilson*. 6 Term Rep. 531. *Beatson v. Haworth*. A deviation for a single night, or even for an hour, discharges the assurer from the policy, as much as a deviation for weeks or months. Park. Inf. 298. *Cock v. Townson*. But a deviation, arising from necessity, and a just cause, does not discharge the assurer from the policy. As if the captain is *forced* by his crew to go out of the course of his voyage, 2 Str. 1264. *Elton v. Brogden*; or leaves the direct course of the voyage to go into a port to

repair. 1 Atk. 545. *Motteux v. London Assurance Company*; or through stress of weather, or to escape a storm. Park Infur. 102. *Harrington v. Halkeld*. 1. Term Rep. 22. *Delaney v. Stoddart*—or avoid an enemy; or goes to the usual place of rendezvous for the purpose of procuring convoy. 2 Salk. 445. *Bond v. Gonfales*. 2 Str. 1265. *Gordon v. Morley*. Cowp. 601. *Bond v. Nutt*. 1 Bos. & Pull. 200. *Driscoll v. Passmore*, in all these cases, if the ship be lost, or captured, the assurer is liable. But in order to justify a deviation from necessity, it must appear, that nothing more was done, than what necessity required. *Doug. 291. Lavabre v. Wilson, 3d edit.* It is not an implied condition in a common marine policy on ship and freight, that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, or otherwise increasing the risk of the insurers: and therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course by reason of a scarcity at her lading port; and during her justifiable stay in the port so entered for that purpose, she took on board bullion there on freight, which the jury found

GORAM v. SWEETING, &c. bind (15) themselves, each one for his own part, their heirs, executors and their goods, to the assureds, their executors, administrators and assigns for the true performance of the premises, confessing themselves paid the consideration due unto them for that assurance by the said *Francis Goram* at and after the rate of 3l. 12s. *per cent.* for six months from the

did not occasion any delay in the voyage; it was held not to avoid the policy. 9 East, 195. *Raine v. Bell*. But a deviation merely intended, and never carried into effect, is as no deviation; and therefore, if the *terminus a quo*, and *terminus ad quem*, be the same, and the ship be lost, or taken, before she reaches the dividing point of deviation, the insurer is liable. 2 Str. 1249. *Foster v. Wilmer*. Doug. 365, 366. *Thellusson v. Fergusson*, 3d edit. Doug. 16. *Wooldridge v. Boydell*. 2 Term Rep. 30. *Way v. Modigliani*. 2 H. Black. 313. *Kewley v. Ryan*. See also 7 Term Rep. 162. *Middlewood v. Blakes*.

(7) The underwriter is not answerable for any loss happening after the ship has been twenty four hours in port in good safety. Park. Insur. 35. *Angerstein v. Bell*. And though the loss be the consequence of an act done during the voyage, yet the underwriter is not liable. As where an insurance was on a ship for six months, and three days before the expiration of the time she received her death's wound, but by pumping was kept afloat till three days after the time, it was held that the insurer was not liable, *Meretony v. Dunlope*, cited 1 Term Rep. 260. So where a ship was insured from *Hamburgh* to *London*, and "till she shall have moored

"at anchor twenty-four years in good safety;" the captain, *in the course of the voyage*, was guilty of smuggling on his own account; the ship arrived in safety at her moorings in the river *Thames* on the 1st September 1785, and remained there in safety till the 17th of the same month, when she was seized by the revenue officers for that smuggling; in an action on this policy, it was holden that the underwriter was not liable; for though the captain was certainly guilty of barratry by smuggling on his own account without the privity of the owners, yet as the policy, by the terms of it, was an undertaking by the insurer for a limited time, namely, during the voyage, and till the ship had moored twenty-four hours in safety, and the ship had in fact moored that time in safety, and was not actually seized till near a month after, it would be leaving the law on insurances unsettled and in much confusion, if any other time were suggested than that prescribed by the policy. 1 Term Rep. 252. *Locker v. Offler*. But where a ship, after being moored, was ordered back *within* the twenty-four hours to perform quarantine, but did not in fact go back till after that time, and before her return to the place where she had so moored, sustained a loss, the insurer was held

the time aforesaid, and at that rate *per cent.* monthly, afterwards, until the end of the said voyage, or until notice should be given for determining the said adventure, as by that writing or policy of assurance more fully appears (16). And the said *Francis Goram* saith that after the making of the said policy of assurance, to wit, on the 18th day of *November* in

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held to be liable; for though the ship was at her moorings above twenty-four hours, yet she could not be said to be there *in good safety*; for that means the opportunity of unloading and discharging, which she had not in that case, because she was arrested, and ordered back within the twenty-four hours. 2 Str. 1243. *Waples v. Eames*. So where an embargo was laid on a ship on her arrival at the port of discharge, and she was detained as a prize, and the captain and crew allowed subsistence as prisoners of war from the time of their arrival; it was held by Lord *Kenyon*, that the ship could not be said to be twenty-four hours, or a minute moored in safety, for immediately she entered the port she was to all intents and purposes captured. Peake Nis. Pri. 211. *Minett v. Anderson*. And if the policy be, “until the ship shall have ended, and be discharged of her voyage,” and not “until she shall have moored at anchor 24 hours in good safety,” it has been holden, that arrival at the port to which she was bound is not a discharge till she is unloaded. Skin. 243. *Anon.*

If the insurance be also on the goods and merchandizes on board the ship, it is usual to add, “that the adventure shall begin upon the said goods and merchandizes, from the loading thereof on

board the said ship, and so shall continue, &c.” “and upon the goods and merchandizes, until the same be there discharged and safely landed.” Although the former words, “from the loading thereof on board the ship,” do not make the insurers answerable for any accidents, which may happen to the goods, in lighters or boats, going abroad previous to the voyage, yet it seems to be settled, that where ships cannot come close to the quay, in order to unload, the insurer, by reason of the latter words, “till the goods are safely landed,” continues responsible for the risk in carrying the goods in boats to the shore. A distinction however has been taken between the case where the loss happened, while the goods were in the boats or lighters belonging to the ship, and while they were in a lighter or boat belonging to the owner of the goods. In the former case the insurer was held to be liable, because it was considered as a continuance of the same ship and voyage; but in the latter he was held to be discharged, because the loss happened after the owner had taken the goods into his possession, and therefore after the insurance was ended. 2 Str. 1236. *Sparrow v. Carruthers*. But where in an action on a policy of assurance on ship and goods from *Petersburgh* to *London*, including the risk of boats to *Cronstadt*,

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In the year of our Lord 1660, at *London* aforesaid in the parish aforesaid, the said *John Sweeting* had notice of the said policy, and thereupon the said *John Sweeting*, on the same day and year aforesaid, at *London* aforesaid in the parish and ward aforesaid, in consideration that the said *Francis Goram* had then and there agreed with the said *John Sweeting*

Cronstadt, beginning the adventure on the goods and merchandizes from and immediately following the loading thereof on board the boats at *Peterburgh*, and in the ship at *Cronstadt*, to continue upon the ship until she should be arrived at *London*, and had there moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until they should be there discharged and safely landed, it appeared in evidence, that the ship and cargo, consisting of hemp, arrived in safety in the river *Thames*,—that the plaintiffs, being the consignees of the goods, by their broker employed and paid a lighterman belonging to one of the public lighters entered at Lighterman's Hall, to land the hemp, that the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman; but it was the constant practice for merchants in the *Russia* trade to land their goods by means of lighters, and that there were no other lighters then in use among the merchants but the public lighters. The court of Common Pleas were of opinion, that the insurer was liable,—they held that the insurers could not be said to be discharged by the delivery of the goods to the lighter, without defeating the words "safely landed;" that the

business of unloading the *Russia* ships was carried on by public lighters, and no private lighters were ever employed by the merchants; and if that were so, no effect could be given to the words "until the goods are safely landed," unless they extended to the goods when on board the public lighters, for in no other manner could they be safely landed. It was true, that the master and owners of the ship were discharged when the goods were put on board the lighter; but the freight and insurance were not commensurate; the latter was far more extensive than the former. The insurance commenced before the freight, for it commenced when the goods were put on board the boats at *Peterburgh*; and so also it continued longer than the freight, for it did not determine until the goods were safely landed; that the case of *Sparrow v. Carruthers* ought not to be extended; it was only a *nisi prius* decision; it had been cited several times, and never recognised, but great pains had been taken to distinguish it from the case before the court. They did not mean however to quarrel with that decision; a case precisely similar was not likely to arise again since it was not customary for the owners of goods to send their own lighters, but always to employ public lighters. That it was admitted

Sweeting to pay him the said *John Sweeting* at the rate of 3l. 12s. *per cent.* for six months, beginning from the 21st day of *August* in the year aforesaid, and to perform all and singular the other things, in the said policy of assurance contained, on the part of the assured to be performed for the assurance of 50l. to be made by the said *John Sweeting*, according

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to be impossible for the large vessels to come up to the wharf in order to deliver their goods, and that the merchants have no lighters of their own, and that the ship's boats were inadequate to the purpose. In all cases therefore, the goods must be delivered by the public lighters, and the court must take the underwriters to be cognisant of the usage of the trade they insure; therefore, relying on the words of the policy, and the constant usage of trade, they held, that the insurer was liable, and recognised the distinction taken by *Buller J.* in a case before him between public and private lighters. 2 Bos. & Pull. 430. *Hurry and others v. The Royal Assurance Company.* See 1 Bos. & Pull. New Rep. 16. *Strong v. Natally.*

(8) Here the ship, by the agreement of the parties, is valued at a certain sum, which the assurers, in the event of a total loss, undertake to pay *pro rata*, according to their respective subscriptions on the policy. This is called a *valued* policy on the ship; so when, in an insurance *on goods*, the value of them is also fixed at the time of effecting the policy, it is called a valued policy on the goods, as well as the ship; and the policy usually runs in this form, "*the said ship, &c. goods and merchandizes, &c. for so much as concerns the assureds*

by agreement between the assureds and assurers in this policy are and shall be valued at 2000l.," (for instance); and sometimes the words, "the policy to be deemed sufficient proof of interest in case of loss," are added. Valued policies are supposed to derive their origin from the difficulty, the assured sometimes had, of proving the value of his interest, and the quantity of his loss; and therefore to obviate this difficulty, he gave the assurers a greater premium to agree to estimate his interest at a precise sum. For it is to be observed, that policies are distinguished into *open* policies, and *valued* policies. The former, so called in contradiction to valued policies, are, where there is no specific value set in the policy on the ship or goods; but the insurance is general on the ship or goods, omitting the words above in italics. In *open* policies, the assured, in order to recover on the policy, is bound to prove the whole case, namely, the instrument or policy, his interest in the ship or goods, the value of them, and the loss, together with the extent and occasion of it; but in *valued* policies, the assured, in case the loss is a total one, after proof of the policy, is only bound to prove some interest in the ship or goods, in order to take it out of the statute of

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according to the tenor of the said policy of assurance, he the said *John Sweeting* then and there agreed and was contented with the said policy of assurance beginning the said adventure from the said 21st day of *August* in the last year aforesaid, (the said ship then being in good safety,) according to the tenor and true intent of the said policy. And the said
John

19 Geo. 2. c. 37. hereafter noticed, and the loss, together with the occasion of it; but he is not bound to prove *the value*, because that is admitted by the assurer. However, valued policies must not be used as a cover for wager-policies which are prohibited by the above-mentioned statute; therefore, though the assured need not prove the value of the goods, but only that he had an interest in them, yet that must be a real *bonâ fide* interest, and not a colourable one, otherwise the policy will be void: as if it should come out in proof that a man had insured 2000l. and had interest on board to the value of a cable only, this would be a clear evasion of the statute, and make the policy void. Indeed valued policies have sometimes approximated so nearly to wager-policies, that it was formerly thought that a valued policy was a wager-policy, interest, or no interest; but this opinion was set right in the case of *Lewis v. Rucker*. 2 Burr. 1171. If the defendant suffer judgment to go against him by default, in an action on a policy of insurance where it is a valued policy, he confesses the plaintiff's title to recover, and the amount of the damages is fixed by the policy. Doug. 315. *Thelluson v. Fletcher*. 3d edit. But if in a valued policy the assured has sus-

tained only a *partial* loss, it is obvious that as the loss is short of a total one, he is as much bound to prove the value of the goods that have been so lost, and to ascertain the damage he has sustained by the loss, as he is in the case of an open policy. In case of a total loss, the constant usage has been, ever since the statute 19 Geo. 2., to permit the valuation fixed in the policy to stand, unless the defendant can shew that the plaintiff had a colourable interest only, or that he has greatly over-valued the goods; but a partial loss opens the policy. Park. Insur. 111.

(9) And therefore the assurer undertakes to assure against all damages by tempest or shipwreck. 2 Roll. Abr. 248 pl. 10. *Pickering v. Barkley*. S. C. Sty. 132. S. C. cited 1 Show 322, 323. *Jefferyes v. Legendra*. 4 Mod. 60. S. C. And it is said that these words would of themselves extend to perils upon the sea by pirates, or men of war, if they were not expressly mentioned in the policy. See 2 Bos. & Pull. New Rep. 316. *Hodgson v. Malcolm*. But where, in an insurance against capture only, it appeared, that the ship, while on her voyage, was driven by a hard gale of wind on the coast of *France*, and was there captured by the enemy, and did not receive any damage from the wind;

Lord

John Sweeting in consideration of the premises then and there undertook, and to the said *Francis* faithfully promised, that he the said *John Sweeting* would well and faithfully perform on his part all the premises in the said policy contained on the part of the assurers to be performed as to the said 50l., beginning the said adventure from the said 21st day of *August* in the year

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Lord *Kenyon* held, that it was clearly a loss by capture, for had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety. Peake's *Nisi Prius*, 212. *Green v. Elmslie*. A ship never heard of is presumed to be foundered at sea; thus, where a ship was insured in 1739 from *North Carolina* to *London*, with a warranty against captures and seizures, and in an action the loss was laid to be by *sinking at sea*. All the evidence given was that she had *sailed* out of port on her intended voyage, and had never since been heard of; and several witnesses proved that in such a case the presumption was that she foundered at sea, all other sorts of losses being generally heard of. The underwriter insisted, that no captures and seizures were excepted, it lay upon the assured to prove the loss happened in the particular manner declared on. But *Lee C. J.* said it would be unreasonable to expect certain evidence of such a loss where every body on board was presumed to be drowned; and all that could be required was the best proof the nature of the case admitted of, which the plaintiff had given; he therefore left it to the jury, who found the loss according to the plaintiff's declaration. 2 Str. 1199. *Green v. Brown*.

(10) See 2 Burr. 683. *Goss v. Withers*.

(11) If an embargo, that is, an arrest, is laid on ships or merchandize by public authority either in time of war or peace, it is a loss within the meaning of the word *detention*, and the insurer is liable, unless indeed the detention has been occasioned by the fraudulent conduct of the insured in navigating against the law of the country in which the ship is detained, or by seizure for non-payment of customs. See 4 East. 34. *Thompson v. Rowcroft*. 5 East. 388. *McCarthy v. Abel*. 3 Bos. & Pull. 479. *Leatham v. Terry*.

(12) The word *people* means the governing power of the country, and not individuals; thus, where in an action on a policy of insurance on wheat and coals, the declaration stated, that the ship was by tempestuous weather obliged to proceed to *Elly* harbour in *Ireland*, where she was, with force, and in a violent manner, attacked and boarded, and *arrested, distrained and detained by people to the plaintiffs unknown*; and it appeared in evidence, that there happening to be a great scarcity of corn there, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which

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year aforesaid, (the said ship then being in good safety, (17).) And the said *Francis* in fact saith, that the said ship, on the said 21st day of *August* in the year aforesaid, was in good safety, to wit, at *London* aforesaid, in the parish and ward aforesaid, but that the said ship, tackle, apparel, ordnance, munition, artillery, boat and other furniture, or any part thereof,

she drove on a reef of rocks, where she was stranded, and would not leave her till they had compelled the captain to sell all the corn at a certain rate which was about three-fourths of the invoice price; it was contended, that the word *people* must be understood as contradistinguished from the magistracy of a country, which is denoted by the words *kings* and *princes*. But it was held by the court, that what happened in this case did not fall within the meaning of "arrests, restraints, and detentions of *kings* and *princes*;" that the meaning of the word "*people*" might be discovered by the accompanying words; *nositur a sociis*; it meant the supreme power, "the ruling power of the country" whatever it might be; that this appeared clear from another part of the policy; for where the underwriters insure against the wrongful act of individuals, they describe them by the names of "*pirates, rogues, thieves*;" then having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of "*kings, princes, and people, of what nation, condition, or quality soever*." These words therefore apply to "*nations*" in their collective capacity. 4 Term Rep. 783. *Nesbitt v. Lushington*.

(13) Every fraud of the master of the ship is barratry; as if he run away with the ship, or embezzle the goods. 8 Mod. 230. *Knight v. Cambridge*. But barratry is not confined to running away with the ship, or embezzling the goods: for it comprehends every species of *fraud, knavery, or criminal conduct in the master*, by which the owners or freighters are injured. Cowp. 155, 156: *Vallejo v. Wheeler per Aston J.* 1 Term Rep. 259. *Lockyer v. Offley*. 4 Term Rep. 33. *Ross v. Hunter*. It must be some breach of trust in the master *ex maleficio*. 6 Term Rep. 379. *Moss v. Byrom*. 7 Term Rep. 508. *Phyn v. Royal Exchange Assurance Company*. Thus, smuggling by the captain on his own account is an act of barratry. 1 Term Rep. 252. *Lockyer v. Offley*. Barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. The words used in the policy are *masters and mariners*, which are very particular; therefore an owner cannot commit barratry; he may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. Neither can barratry be committed against the owner *with his consent*; for though the

thereof, did not arrive in good safety from the said voyage at *London* aforesaid; but the said ship afterwards, to wit, on the 25th day of *November* in the said year of our Lord 1669, upon her said voyage in parts beyond the seas, to wit, out of the streights of *Gibraltar* towards *London* aforesaid, being upon the high sea, were by the perils of the sea (18), and by the

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the owner may become liable for a civil loss by the misbehaviour of the captain, if he consents, that is not barratry. Barratry must partake of something criminal, and must be committed *against the owner* by the master or mariners. 1 Term Rep. 330. *Nutt v. Bourdieu*. See 8 East, 126 *Earle v. Rowcroft*.


Therefore where the master acts only for the benefit of his owners, it is not barratry, though it may be a deviation, or a breach of contract. 2 Str. 1173. *Stamma v. Brown*. S. P. Ibid. 1264. *Elton v. Brogden*. Cowp. 143. *Vallejo v. Wheeler*. If the plaintiff, in his declaration on a policy of insurance against the barratry of the master, assigns the breach, that the loss of the ship was "by the *fraud* and negligence of the "master," it is sufficient, though it is not expressly alleged that the ship was lost by the *barratry* of the master; for barratry imputes fraud. 2 Ld. Raym. 1349. *Knight v. Cambridge*. S. C. 1 Str. 581. 8 Mod. 230. S. C. cited in 8 East, 135.

(14) It is held that these general words "all other perils, losses and misfortunes," do not extend beyond the perils specified in the policy. 6 Term Rep. 419. And it is settled that, to intitle the insured to recover upon the policy, the loss which has happened,

must be the direct and immediate consequence of the peril insured, and not a remote one. *Jones v. Schmoll*, cited 1 Term Rep. 130. note (a).

(15) However, notwithstanding these words, a policy of insurance is not a specialty, but a simple contract only, because it is not under seal, which is essential to the constitution of a deed.

(16) It is now usual to add, at the foot of the policy, these words, "N.B. "corn, fish, salt, fruit, flour, and seed, "are warranted free from average, "unless general, or the ship be stranded; sugar, tobacco, flax, hemp, "hides and skins are warranted free "from average under five pounds *per* "cent. and all other goods, also the "ship and freight are warranted free "from average under three *per cent.* "unless general, or the ship be stranded." This clause is said to have been first introduced about the year 1749, before which time the insurers were liable for every injury that happened to the goods insured. Therefore to deliver the insurers from small averages, and to prevent disputes, this memorandum, as it is called, has been inserted, whereby the insurers expressly provide that they consider themselves free from partial losses not amounting to 5l. *per cent.* on sugar, tobacco, hemp, flax,

GORAM *v.* the force of wind and storm, sunk and destroyed, to wit, at
 SWEETING, London aforesaid in the parish and ward aforesaid, whereof the
 &c.  said Francis afterwards, to wit, on the last day of November
 in the 2. st year of the reign of our lord Charles the second,
 at London aforesaid in the parish and ward aforesaid, gave
 notice to the said John Sweeting, and then and there, acc-
 cording

flax, hides and skins; and also discharged from partial losses on all other goods as well as on the ship and freight, *if the loss be under 3l. per cent. unless it arises from the general average, or the stranding of the ship.* And as the articles of corn, fish, salt, fruit, flour and seed are of a perishable nature, and it may therefore be difficult to ascertain the true cause of the damage which they receive, whether it arose from any accident, or from the nature of the articles themselves, the insurers thereby also expressly provide, that they will not be answerable for any average or partial loss to them, but only for a general average, unless the ship be stranded. Thus where in an insurance on fruit from Lisbon to London, it appeared that the ship was captured and recaptured, brought into Portsmouth, and afterwards arrived at London; and the cargo by reason thereof, and the consequent length of the voyage, had sustained a damage of 80l. *per cent.* but the assured never heard of the capture till the ship was safe at Portsmouth, and then he offered to abandon: and an action being brought against the insurer for a total loss, Lord Kenyon, before whom the case was tried, said that, as there had been no stranding, there could not be a recovery for a partial loss; the question then was, whether the assured

could recover for a total loss? had the plaintiff heard of the capture only, he might have abandoned; but he heard nothing of the accident till the ship was in safety. The cargo arrived at the port of destination, and though it was good for very little, yet it had invariably been held, that the voyage must either be lost, or the cargo, if it be one of those mentioned in the memorandum, must be *wholly and actually destroyed* to entitle the assured to recover. *At Andrews v. Vaughan* cited in Park. Insur. 115. See 4 Term Rep. 783. *Nesbitt v. Lushington. Mason v. Skurry*, Park. Insur. 112. But if the ship be stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the sea, *though no part of the loss arises from the act of stranding.* For if the ship be stranded, it destroys the exception, or condition, upon which the articles enumerated in the memorandum are to be free from average, and the body of the policy then operates upon them, as much as upon any other commodity. 7 Term Rep. 210. *Burrett v. Kinsington*; in which the authority of the cases of *Wilson v. Smith*. 3 Burr. 1550. and *Cocking v. Fraser* Park. Insur. 114 seems to be doubted, if not shaken, by the court. See 7 East. 38. *Anderson v. Royal Exchange Assurance Company.*

According to the custom of merchants, abandoned (19) to the said *John Sweeting*, and other assurers, who had subscribed the said policy, all his interest in the said ship, and the other premises so as aforesaid assured, and then and there required the said *John* to pay him the said *Francis* the said 50l. so by the said *John Sweeting* aforesaid assured, which he the said *John*

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Company. The word *Corn* is a general term, as it is held to include many particulars, such as peas, beans, and malt. *Park. Insur.* 113. It is held that *Rice* is not corn within the meaning of the memorandum. 2 *Bos. & Pull.* New Rep. 213.

After all, it appears that a policy of assurance is a very inaccurate instrument, and it has been observed by Lord *Kenyon*, that he remembered it was said many years ago, that if *Lombard-street* had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible. 4 *Term Rep.* 238. *Drough v. Whitmore*. And *Bulwer J.* in the same case added that a policy of assurance had at all times been considered in courts of law as an absurd and incoherent instrument; but it was founded on usage, and must be governed and construed by usage. *Ibid.* 210. However, it is held that policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have required a peculiar sense distinct from their ordinary and popular sense. 4 *East*, 135, 136. *Robertson v. French*.

(17) It seems necessary now to aver that the insured was interested, at the time of effecting the policy, in the ship or goods to the amount of the money insured; thus, "And the said A. B. in fact says, that the said A. B., at the time of the making of the said policy of assurance, and from thence until and at the time of the loss hereafter mentioned, was interested in the said ship, or the said goods so laden on board the said ship, to a large value, to wit, to the value of all the money ever by him insured or caused to be insured thereon, to wit, at, &c." or to allege, "that the ship did not belong to his majesty, or any of his subjects before or at the time of making the policy, or at the time of the loss," so as to take it out of the statute 19 Geo. 2. c. 37. 8 *Term Rep.* 13. *Craufurd v. Hunter*. It seems it is not sufficient, and would therefore be bad on a special demurrer, to state, that the plaintiff was interested until and at the time of the loss, without shewing that he was interested at the time of the policy being made. 2 *Bos. & Pull.* 153. *De Symonds v. Sheldon*. Before that statute, a person might have insured without having any interest. 8 *Term Rep.* 23. *Craufurd v. Hunter*; but now it is enacted by it, that no assurances shall

GORAM v. SWEETING, &c. *John* by reason of the premises and according to the custom of merchants ought to have paid to the said *Francis*. Yet the said *John Sweeting*, not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Francis Goram* in this behalf, did not bear the adventure of the said ship, tackle, apparel.

be made by any person, bodies corporate and politic, on any ship or ships belonging to his majesty, or any of his subjects, or on any goods, merchandizes or effects laden, or to be laden, on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that every such insurance shall be null and void to all intents and purposes. Provided that insurance on private ships of war fitted out by any of his majesty's subjects, solely to cruize against his majesty's enemies, may be made by the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer. In the construction of this statute, it is held that it only applies to ships belonging to his majesty or any of his subjects, and therefore it does not extend to foreign ships, but an insurance may be made on foreign ships and property, interest or no interest, as before. Doug. 315. *Thellusson v Fletcher*. 3d edit. 8 Term Rep. 23. *Craufurd v. Hunter*. 2 East, 385. *Nantes v. Thompson*. It is held that several persons may insure several different interests upon the same thing, each to the whole value; as the matter for wages; the owner for freight; one person for goods, ano-

ther for bottomry. 1 Burr. 495. *Godin v. London Assurance Company*. An insurable interest is a very different interest from most others, that can be stated. Thus where a ship captured by his majesty's ships was insured at and from O. to L., it was held, that the sea officers and crew had an insurable interest, inasmuch as they had the possession, and a certain expectation of receiving the property captured for their own emolument from the crown, *Le Cras v. Hughes*. Park. Insur. 269. So it was holden, that commissioners appointed by the crown under the authority of an act of parliament which enabled them to take, into their possession and care, all Dutch ships and effects detained or brought into the ports of Great Britain, and to manage, sell and dispose of the same to the best advantage, according to the instructions they should receive from his majesty and his privy council, might insure in their own names such ships and effects after seizure abroad, and while they are in transitu to Great Britain. 8 Term Rep. 13. *Craufurd v. Hunter*. 3 Bos. & Pull. 75. *Lucina v. Craufurd*. S. P. See 2 Bos. & Pull. New Rep. 269. as to what passed in the house of lords upon the question arising out of the above case. A *venire de novo* was awarded; and verdict for the plaintiff

apparel, ordnance, munition, artillery, boat and other furniture, so as aforesaid sunk and destroyed, or any parcel thereof as to the said 50l., or any part thereof, nor has yet paid the said *Francis* the said 50l. or any part thereof, or anywise contented him for the same, (although to do this, the said *John Sweeting* afterwards, to wit, on the 1st day of *March* in the

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22d.

plaintiff below on the count which averred the interest in the crown. It has also been adjudged that the captors of ships seized as prize may insure their interest therein, and are not entitled to a return of premium although it be afterwards adjudged to be no prize, and restitution be awarded to the owners by the court of admiralty. 8 Term Rep. 154. *Boehm v. Bell*. And the usual averment in the declaration, that certain persons using trade and commerce under the stile and firm of messieurs H., were interested in the cargo, and that the said policy was made for their use, was held to be supported by evidence that previous to effecting the policy, messieurs H. had admitted another mercantile house to a joint concern in the cargo insured: for a jointenant or a tenant in common has such an interest in the entirety as will entitle him to insure; and a policy made by him is not a wager policy; for the averment being in substance nothing more, than that the parties, for whose benefit the insurance was made, had an interest in the subject of that insurance, they are not bound by the terms of the averment to shew any thing more, and if they shew an interest to the extent of one hundredth part of the cargo, it is sufficient within the spirit of the 19 Geo. 2. which only

requires that the policy shall not be a gaming one. 2 Bos. & Pull. 240. *Page v. Fry*. But a sailor cannot insure his wages, or any thing that he is to receive at the end of the voyage in lieu of wages, as slaves for instance. 7 Term Rep. 157. *Webster v. De Tasslet*. The profits of a cargo employed in trade on the coast of *Africa*, have been holden to be an insurable interest. 2 East, 544. *Barclay v. Cousins*. So an insurance on imaginary profit from *Bourdeaux* to *Hamburg* (which was explained to mean the profit which a cargo of indigo belonging to the assured would produce on the sale thereof at *Hamburg*, if it arrived safe,) was holden good. Ibid. 549. *Henricksen v. Margetson*, note. If an action be brought in the name of the agent, and he avers that the policy was effected for the benefit, and on the account of his principal, who appears to be an alien enemy, the defendant may plead in bar, that the principal is an alien enemy; for no action can be maintained by an alien enemy, and the law will not permit him to do that indirectly, which he cannot do directly, namely, to recover in the name of his trustee a thing which he cannot recover in his own name, 6 Term Rep. 23. *Brandon v. Nesbitt*.

If the policy be on goods, and the
O o 2 declaration

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22d year of the reign of our said lord the now king, at *London* afore said in the parish and ward afore said, was by the said *Francis Goram* often requested.) Wherefore the said *Francis* saith he is injured, and has sustained damages to the value of 100*l*. And therefore he brings suit, &c. (20).

And

declaration avers that the goods were put on board, it is necessary to allege that they were put on board at the *loading place*, otherwise it seems bad on a special demurrer. 2 Bos. & Pull 153. *De Symonds v. Shedden*. The form of the averment should be thus, "that divers goods and merchandizes of the said plaintiff of great value, to wit, of the value of £. afore said were loaded, and put on board the said ship at *London* afore said in the said writing or policy of assurance mentioned." 2 Bos. & Pull. 153. *De Symonds v. Shedden*.

(18) It is essentially necessary, that the plaintiff should state in his declaration, by which of the perils insured against, it was, that the loss happened; whether by capture, or perils of the sea; by barratry or detention; or by what other of the perils mentioned in the policy; and if his evidence does not prove, that the loss happened by the very means stated in the declaration, he will fail. Thus where the declaration averred that the ship was *captured* and all the goods and merchandizes on board her were totally lost, evidence that the ship was captured, but that, being afterwards restored, she might notwithstanding have reached her destined port, in which case the insurer would have been discharged by the terms of the policy, was held not to be sufficient to support the averment,

and the plaintiff was nonsuited, and the nonsuit afterwards confirmed by the court. 1 Term Rep. 304. *Kemp v. Vigne*. But where, in moving a ship from one part of an harbour to another, it became necessary to send two of the crew on shore to make fast a new line, and cast off the rope by which the ship was made fast; those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, and the ship in consequence thereof went ashore; this was held a loss by perils of the sea. 2 Bos. & Pull. New Rep. 336. *Hodgson v. Malcolm*. So where the declaration averred "that the goods and merchandizes were in a forcible and *hostile* manner seized, captured, taken, and carried away by certain persons then being at enmity and open war with our lord the present king to the plaintiffs unknown, and by reason thereof the said goods and merchandizes then and there became and were wholly lost to the plaintiffs:" but the evidence was, that the goods were seized in their passage by two *Spanish* government brigs, the landing of the said goods being illegal by the revenue laws of Spain:" after verdict for the plaintiff, a motion was made in the C. B. for a nonsuit to be entered, and on shewing cause the court intimated a clear opinion that the evidence

And now at this day, to wit, on *Monday* next after three weeks of *St. Michael* in this same term, to which day the said *John Sweeting* had leave to imparl to the said bill, and then to answer, before our lord the king at *Westminster* comes as well the said *Francis Goram* by his said attorney, as the said *John Sweeting* by *Basil Herne* his attorney, and the said

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John

evidence did not support the averment, but gave no judgment because the parties agreed that there should be a new trial without costs on either side, and the plaintiff should be permitted to amend his declaration. *Matthie and others v. Potts*. C. B. Hil. 42 Geo. 3.

So an averment in the declaration that the ship, having her cargo on board, was with force and in a violent and unlawful manner attacked, and boarded and arrested and detained by *people* to the plaintiffs unknown, was held not to be supported by evidence that the cargo was seized and taken by *a mob*, because a seizing by a mob does not come within the words, "arrests and detainments of people" in the policy, but if the averment had been that the ship was taken by *pirates*, that evidence would have been sufficient to support it. 4 Term Rep. 783. 787. *Nesbitt v. Lushington*. But where the declaration, on a policy of insurance on the ship *E.*, in a lawful trade for 12 calendar months, to commence on her sailing from *S.*, stated, that the ship proceeded in a lawful trade from *S.*, and afterwards from *O.* in a lawful trade to *S.*, and that before the ship arrived at *S.* she put into another port, where the master of the ship in a barratrous and fraudulent manner, without the knowledge,

consent or privity, and against the will of the plaintiff the owner of the ship did commit an act, namely, smuggle foreign brandy, whereby the ship was forfeited and seized, it was held on demurrer, that the insurers were liable for the loss occasioned by the smuggling of the captain, for *lawful trade* must be applied to the trade in which *the owners employ the ship*. 3 Term Rep. 277. *Havelock v. Hancill*. And proof, that the person who was described in the policy as master, and who was treated with and acted as such, committed an act of barratry, is *prima facie* sufficient evidence that he was captain only, and it is not necessary that the plaintiffs should also negatively shew that he was not owner, or that any other person was; this proof must be made by the defendant if he wishes to avail himself of it. For all that is incumbent on the plaintiff to prove in case of a loss is, the subscription* by the underwriter,—his own interest in the ship or goods,—or in case of goods; his shipping them on board the vessel described in the policy, and the loss by the means averred in the declaration. 4 Term Rep. 33. *Ross v. Hunter*. So where, in an action on a policy of insurance on slaves against the perils of the sea, the declaration averred, that the ship was by tempestu-

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John defends the wrong and injury, when, &c.; and says, that the said *Francis Goram* ought not to have or maintain his said action thereof against him, because he says, that the said ship, tackle, apparel, ordnance, munition, artillery, boat and other furniture aforesaid, after the exhibiting of the said bill, and before this day, to wit, on the 20th day of *July* in the

22d

ous weather, and through the mere perils and dangers of the seas, greatly delayed in her voyage; by reason whereof, and from a failure of proper food occasioned by the delay of the voyage, divers of the said slaves became dis-tempered and died; it was held, that the death of the slaves, occasioned by improper food arising from the hardships and delay of the voyage, was not a loss by *the perils of the sea*, but a mortality by *natural death*; and as a loss by natural death cannot be insured against since the statutes 30 Geo. 3. c. 33. s. 8. and 34 Geo. 3. c. 80. the plaintiff cannot recover for that. 6 Term Rep. 656. *Tatham v. Hodgson*. In an action on the policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship, under the register acts. And such parol evidence of ownership, arising from possession at a particular period, is holden not to be disproved by shewing a prior register in the name of another, and a subsequent register to the same person. 4 East, 130. *Robertson v. French*.

But if the declaration states a *total* loss of the ship, and the damages are laid for a total loss, the plaintiff may give evidence of a *partial* or average

loss, and shall recover *pro tanto*, that is, to the amount of the loss which he is able to prove. 2 Burr. 904. *Gardiner v. Creasdale*. And where the declaration contained an averment, that *after* the making of the policy, the ship was in safety at L. and that afterwards she sailed upon her voyage to M. and arrived at M. and was lost on her return to L., but the evidence was that the ship sailed *before* the policy was effected, Lord *Kenyon* held, that the variance was *immaterial*, and the court of K. B. confirmed his opinion. And *Buller J.* took that opportunity of commenting upon, and explaining, the cases of *Brislow v. Wright* Doug. 664. 3d edit. and *Savage qui tam v. Smith*. 2 Black. Rep. 1101, which had been cited on that occasion; (and are too often cited on other occasions, without the least application;) and as the observations of so learned a judge as he was, and whom none ever surpassed in the knowledge of his profession, and in the luminous and comprehensive manner in which he embraced every subject that came before him for judgment, may be of great service, I will give them in his own words: "The two cases cited do not apply to the present case. I am aware that the case of *Brislow v. Wright* has been sometimes doubted, but

22d year of the reign of our said lord the now king, arrived at the port of *London* aforesaid, to wit, in the parish of St. *Mary le Bow* in the ward of *Cheap*, in good safety from the said voyage; and the ship with all her said tackle, apparel, &c. was there moored at anchor twenty-four hours in good safety; without that, that the said ship, tackle, apparel, ordinance,

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“ but I am still of opinion, that it was
“ rightly decided. In order to entitle
“ the plaintiff to maintain that action,
“ it was necessary for him to shew that
“ he was landlord, it being an action
“ against the sheriff for taking the les-
“ see's goods without leaving a year's
“ rent; and to shew that the plaintiff
“ was the landlord, he was obliged to
“ set forth a contract between himself
“ and the tenant. *Now contracts are*
“ *in their nature entire, and in pleading*
“ *they must be stated accurately.* But as
“ the evidence in that case did not ac-
“ cord with the contract stated in the
“ declaration, and which was the foun-
“ dation of his action, it was properly
“ determined that a judgment of non-
“ suit should be entered. In the case
“ of *Savage v. Smith*, I admit that it
“ was not necessary for the plaintiff
“ to state the judgment, but as the
“ plaintiff alleged that the party re-
“ cover a judgment, and that he sued
“ out a writ of execution upon the
“ judgment, the execution was necessa-
“ rily tied down by that judgment,
“ and therefore the judgment was made
“ material by the subsequent words
“ which were introduced. So in an
“ action for words, where a long in-
“ troduction is unnecessarily inserted in
“ the declaration if the charge be tied

“ up to that introduction, the latter
“ must be proved; because the ma-
“ terial part is thus made to depend on
“ the immaterial part of the declara-
“ tion. But the averment in this case
“ does not arise out of the contract,
“ nor is the contract, as stated in the
“ declaration, made to depend upon it.
“ And if the averment were omitted,
“ the declaration would be perfect
“ without it.” 5 Term Rep. 496.
Peppin v. Solomons. What was said by
Buller justice, in *Peppin v. Solomons*, was
afterwards recognized by *Lawrence*
justice, in *Williamson v. Allison*. 2 East,
452. “ With respect to what aver-
“ ments are necessary to be proved, I
“ take the rule, says he, to be, that if
“ the whole of an averment may be
“ struck out without destroying the
“ plaintiff's right of action, it is not ne-
“ cessary to prove it; but otherwise
“ if the whole cannot be struck out
“ without getting rid of a part essential
“ to the cause of action: for then,
“ though the averment be more parti-
“ cular than it need have been, the
“ whole must be proved, or the plaintiff
“ cannot recover.” In the last cited
case the declaration stated that the
plaintiff bargained with the defend-
ant to buy of him a quantity of claret:
and the defendant then and there

GORAM v. SWEETING, &c. nance, munition, artillery, boat and other furniture were sunk and destroyed in the said voyage, in manner and form as the said *Francis* hath above alleged; and this he is ready to verify; wherefore he prays judgment if the said *Francis* ought to have or maintain his said action thereof against him, &c.

Demurrer and joinder in demurrer.

But

well knowing the said claret to be in an unfit and improper state to be exported, by then and there *falsely* and *fraudulently warranting* the claret to be in a fit and proper state to be exported, then and there *falsely, fraudulently, and deceitfully* sold the said claret to the plaintiff, &c. whereas the said claret was not in a fit and proper state to be exported, whereby the plaintiff sustained damage, &c. and so the defendant *falsely* and *fraudulently deceived* the plaintiff. The court held that it was not necessary to prove that the defendant *knew* that the claret was not fit to be exported, because the averment of the *scienter* might be struck out of the declaration without destroying the action. See 6 East, 316. *Hodgson v. Glover*.

(19) An abandonment is a relinquishment of whatever may be saved for the benefit of the assurer. When the thing insured is, by means of some of the perils specified in the policy, become of little value to the assured, he is intitled to call on the assurer to accept of what is saved, and to pay the full amount of his insurance, just as if a total loss had actually happened: but before the assured can do this, he must cede or abandon the ship or goods for

the benefit of the assurer; for if the assured were allowed to recover for a total loss, and also to retain the property saved, instead of being indemnified by the contract of insurance, which is its true nature and object, he would be a considerable gainer by it. The assured, from the time that satisfaction is made to him for the loss, becomes, as to the ship or goods, if restored in specie, or compensation made for them, a trustee for the assurer in proportion for what he paid. 1 Ves. 98. *Randal v. Cockran*. 3 Bos. & Pull. 478. *Leatham v. Terry*. 4 East, 31. *Thompson v. Rosecroft*. An abandonment must be a *total* one; there can be no such thing as a *partial* abandonment; that is, one part of the property cannot be retained, and the other abandoned. It is in all cases, in the election of the assured, either to abandon or not; but he cannot, by electing to abandon, turn an average or partial loss into a total one. 2 Burr. 697. *Goss v. Withers*. And it seems fully settled, that there cannot be an abandonment, unless, at some period or other of the voyage, there has been a *total* loss. 1 Term Rep. 187. *Cazalet v. St. Barbe*. See 5 East, 388. *M'Carthy v. Abel*. 2 East, 109. *Shaw v. Felton*.

A total

But because the court of our lord the king now here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the parties aforesaid before our lord the king at *Westminster*, until *Monday* next after 15 days of *St. Martin* to hear their judgment of and upon the premises, because the court of our lord the king here is thereof
not

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A total loss is of two sorts; one is, where in fact the whole of the property perishes, which we have nothing to do with in the present inquiry; and the other, which is the case now before us, is, where the property exists, but the voyage is lost, or the expence of pursuing it exceeds the benefit arising from it; and therefore it is not worth pursuing: in these cases the owner may abandon. 1 Term Rep. 615. *Mitchell v. Edie*. So if the damages exceed half the value; or a further expence be necessary, and the assurer will not at all events undertake to pay that expence; or if the salvage is high; or where it amounts to a half or more, the assured may abandon. 2 Burr. 1209. *Hamilton v. Mendes*. Doug. 231—235. *Miller v. Fletcher*, 3d edit. This damage or loss however must be occasioned by one of the perils insured against; see also 5 East, 388. *McCarthy v. Abel*. But if the loss had only been a partial one, that is, if it has not been attended with any of the consequences just enumerated, the assured cannot abandon. Thus if a ship is taken, that in general cases will amount to a total loss, and the assured may abandon, because in general the voyage and ship are both lost; but if the capture has been followed with little or no hindrance to the voyage, as

if the ship is re-captured, or ransomed, or escapes, and so meets with only a temporary obstruction, and sustains little or no damage, and afterwards pursues her voyage, and reaches her port of destination, this is not a total loss, and the assured cannot abandon. 2 Burr. 694. 696, 697. *Goss v. Withers*. Ibid. 1198. *Hamilton v. Mendes*. 1 Black. Rep. 276. S. C. So by the general law an arrest or embargo is a total loss, and the owners may abandon immediately upon the arrest or embargo: but if the embargo should be taken off in a very short time, and little or no damage be occasioned thereby, and the ship afterwards proceeds on her voyage, and the assured receives no advice of it until after the embargo has been taken off, he cannot abandon; for no right can vest as for a total loss, till the assured has made his election either to abandon or not; he cannot elect until he has information of the loss, and if by the same conveyance it appears that the peril is over, and the thing insured is in safety, he has lost his election entirely. 2 Burr. 1211. *Hamilton v. Mendes*. 5 East, 388. This election to abandon must be made by the assured immediately after they have received intelligence of a total loss, and they are bound to give the assurers notice in a
reasonable

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not yet, &c. And after several continuances the judgment is as follows—At which day before our lord the king at *Westminster* come the parties aforesaid, by their attornies aforesaid, whereupon all and singular the premiefs being seen, and by the court of our said lord the king here more fully understood, and mature deliberation being thereupon had, for that it appears to the court of our lord the king here, that the plea aforesaid, by the said *John* in manner and form aforesaid above pleaded, and the matter in the same contained, are not

reasonable time, otherwise they waive their right to abandon, and can only recover as for an average loss. 1 Term Rep. 608. *Mitchell v. Edie*. Park. Insur. 172. *Allwood v. Henckell*. See 7 East, 24. *Sharp v. Gladstone*. Ibid. 38. *Anderson v. Royal Exchange Assurance Company*.

(20) Besides this, there is what is called a *re-assurance*, which is a contract that the insurer enters into, in order to relieve himself from those risks which he has incautiously undertaken, by throwing them upon other persons, [who are called re-assurers. By this contract the re-assurer agrees to put himself in the place of the assurer, and to pay all the loss which the first assurer undertook to pay. If it so happen, that a person after underwriting the policy, either repents of his engagement, or is afraid of encountering the risk, he gives another person a premium to take upon himself the risk in his stead, that is, to re-assure him. But still the assured, in case of a loss, must make his demand on the first insurer; for the first contract, notwithstanding the re-assurance, subsists as at first without change or alteration; for the re-assurer is wholly unconnected with the person who was originally insured. But re-assurance having been much abused, it is enacted

by statute 19 Geo. 2. c. 37. s. 4. that it shall not be lawful to make re-assurance, unless the assurer should be insolvent, become a bankrupt or die; in either of which cases such assurer, his executors, administrators or assigns, may make re-assurance to the amount before by him assured, provided it be expressed in the policy to be a re-assurance.

There is also what is called a *double assurance*, which is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same goods, or the same ship. 1 Burr. 495. *Godin v. London Assurance Company*.

So that a re-assurance is a contract entered into by the *assurer*, and a double insurance is entered into by the *assured*. But though a double insurance is not, like a re-assurance, made void by any statute, yet the person who make it cannot recover for any more than the amount of his loss; he may indeed recover *his loss* against which of the underwriters he pleases, but he can only recover *one* satisfaction for *one* loss. 1 Black. Rep. 416. *Newby v. Reed*. 1 Burr. 492.

sufficient

sufficient in law to bar the said *Francis* from having his said action thereof maintained against the said *John*, it is considered that the said *Francis Goram* ought to recover his damages against the said *John* on occasion of the premises; but because it is unknown to the court of our lord the king here what damages the said *Francis* has sustained on occasion of the premises, therefore the sheriff is commanded, that by the oath of 12 good and lawful men of his bailliwick, he diligently inquire what damages the said *Francis* has sustained, as well on occasion of the premises, as for his costs and charges by him about his suit in this behalf expended, and that he send the inquisition which, &c. to our lord the king at *Westminster*, on *Monday* next after the octave of *St. Hilary*, under the seal &c. and seals, &c. together with the writ of our said lord the king to him thereof directed, &c. The same day is given to the said *Francis* there, &c.

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Goram *versus* Sweeting, Same *versus* Fowke, Case 39.
and Same *versus* Bateman.

Mich. 22 Car. 2. Regis. Rot. 367.

ASSUMPSIT on a policy of assurance by *Goram* plaintiff against *Sweeting* defendant. The plaintiff declares that he had caused a policy of assurance to be written on the good ship called the *Margaret* of *London*, and on the tackle and apparel, &c. of the same ship, in which policy it was contained, that if any misfortune should happen to the ship in the voyage, it should be lawful for the plaintiff to sue and labour for the defence and safety of the ship, without any prejudice to the policy, and that the assurers, of whom the defendant was one, would contribute to the charges thereof according to the several sums respectively insured by them. And the plaintiff further shews, that the defendant became an assurer on the said policy for 50l., and in consideration of the plaintiff's promise to pay him at the rate of 3l. 12s. per cent. for six months, undertook and promised to perform the

said

(b) S. C. 2 Keb. 717, 722.
In *assumpsit* the plaintiff declares that the ship, tackle, &c. were sunk and destroyed; if the defendant traverses it, the traverse must be in the *disjunctive*, and not in the *conjunctive*.

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saïd policy as to 50l. so insured by him. And the plaintiff avers in fact, that the ship, &c. did not arrive in safety, but "that the saïd ship, tackle, apparel, ordnance, munition, artillery, boat and other furniture were sunk and destroyed in the saïd voyage," of which the plaintiff gave the defendant notice, and abandoned all his interest therein, yet the saïd defendant has not borne the adventure, nor paid the saïd 50l., wherefore the plaintiff brings this action.

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The defendant pleads in bar that the ship and all the apparel and tackle aforesaid arrived in good safety, and traverses without this, that "the saïd ship, tackle, apparel, ordnance, munition, artillery, boat and other furniture were sunk and destroyed in the saïd voyage in manner and form as, &c." and this, &c. wherefore, &c. upon which plea the plaintiff demurs in law.

And Jones for the plaintiff argued that the traverse in the defendant's plea was bad, because the defendant has traversed in the *conjunctive*, namely, without this that the saïd ship and tackle, &c. were sunk and destroyed, whereas it ought to be in the *disjunctive*, namely, without this that the saïd ship or tackle, &c. were sunk and destroyed. For, as he said, if in this case any of the things enumerated arrive in safety, as, for instance, if the ship arrive in safety, although all the goods and merchandizes, and all the apparel and tackle of the ship, for which by the policy a satisfaction ought to be made to the plaintiff are lost, yet if issue had been taken on the defendant's traverse as it now is, it would be found against the plaintiff; and this action being only for damages according to the loss which the plaintiff has sustained, every part ought to be put in issue. For perhaps the ship arrived in safety, and yet the other things, as guns and anchors, and all the goods and merchandizes are lost, which ought to be put in issue by themselves; so that the plaintiff may have a verdict for the loss of them, and his damages assessed according to the proportion of them, and the defendant may be acquitted of the residue. But now unless the plaintiff prove that the ship and *all* the other things are lost, he shall not recover for any part. And if the defendant prove that only a *cable* or *anchor* arrived in safety, he would be acquitted of the whole, if the plaintiff had taken issue on this traverse. Wherefore he concluded

that the traverse was bad, and prayed judgment for the plaintiff.

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Coleman and *Saunders* for the defendant argued, that the traverse was good. For in the policy there are two clauses; one, if the ship, or tackle and apparel, are damnified, the plaintiff may labour to save them, and the defendant is to pay his proportion of the charges of it, and the other, that if the ship, &c. shall be totally lost, then the defendant is to pay 50l. And here the plaintiff avers a total loss of the ship and goods, &c. wherefore he demands the 50l. And the plaintiff has averred in the copulative "that the said ship, tackle, apparel, ordnance, munition, artillery, and other furniture" were totally lost, whereby he has given an advantage to the defendant to traverse it precisely as the plaintiff has alleged it; as in the case of *Tatem v. Perient*. Yel. 195. where the plaintiff had alleged more than he needed in his declaration, and thereby gave an advantage to the other side to traverse it (21). So in *Sir Francis Leake's* case, Dyer 365. (22).

And

(21) In that case, the defendant having granted the plaintiff 1000 trees in such a wood to be felled within three years next after the grant, and the plaintiff having felled some of the trees, the defendant, in consideration that the plaintiff would forbear to fell any more trees until after the three years, undertook to give the plaintiff leave to fell the remainder of the trees after the three years; and the plaintiff averred that at the time of the promise he had felled only 800 trees and no more, and assigned a breach that defendant hindered him from felling the residue of the trees after the three years. The defendant pleaded that before the said supposed promise the plaintiff had felled 1000 trees, *without this that at the time of the promise he had felled 800 trees only. &c.*

and on demurrer, it was held that the traverse was good, for the plaintiff by alleging the felling of 800 trees only in his declaration, which was a matter inisable, had given an advantage to the defendant to traverse in the manner he had done: *for every matter of fact alleged by the plaintiff may be traversed by the defendant, and the defendant by way of traverse may answer the matter alleged in the same words as the plaintiff has alleged them.*

(22) There, the plaintiff in his plea in bar to an avowry, justifying the taking in the place in which, &c. as being the freehold of Sir F. L. said, "that he was seized in his demesne as of fee" of B. close, adjoining to the place in which &c. that Sir F. L. was bound to repair the fence between B. close and the place

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And although this action is only to recover damages, and no penalty, yet the plaintiff ought not to recover damages on this breach, but ought to have recovered damages for not contributing to the charges, (a) &c. and if he had so done, then the loss or spoliation of each particular thing ought to have been put in issue; for the damages were to be recovered particularly for every thing according to the proportion of the thing lost or spoiled, and of the defendant's assurance. But here the plaintiff would recover the entire 50l., although there is only an anchor or cable lost; but in such case the defendant ought to come to an average only (23).

But

place in which, &c., and the cattle escaped through a defect of the fence. The defendant traversed, "without this" that the plaintiff was seised in his "demesne as of fee of B. close," and on demurrer, the opinion of the court was, that the precise estate which the plaintiff had in B. close would not have been traversable by the defendant, if the plaintiff had only shewn any estate in it generally, as that he was seised, without shewing of what estate, or that it was his freehold, &c., for then the defendant would be driven to say, that the plaintiff had nothing in it; for if he had only a right of common, or a term for years, or at will, or even the owner's leave to put in his cattle *pro hac vice*, it had been sufficient; and then the better answer would have been with a flat negative, namely, that he had nothing in the said close at the said time when, &c., which is the most apt pleading; for an *absque hoc* ought to be taken to a thing expressly alleged before, and is induced with a former plea, "as before" says, or with shewing a cross matter contrary to the plaintiff's plea, as in the

above case, namely, that B. close was the freehold of Sir F. L. without this, &c.; and at length the opinion of the court was, that the *absque hoc* that he was seised in fee, was a good traverse, because the plaintiff had given this advantage to his adversary to traverse this preciseness of estate, for the plaintiff best knew what interest he had to put in his cattle into B. close; for if he was a mere stranger and had nothing in B. close, neither a right of common there, nor the owner's leave, or command, he was a trespasser to the defendant, although the inclosure was not sufficient. Willes's Rep. 103. *Cockerill v. Armstrong*. 2 H. Black. 527. *Dovaston v. Payne*.

This is so material a case, and furnishes so useful a guide, to direct the pleader's judgment in deciding what allegations are proper to be made, and shews the great advantage which immaterial and irrelevant allegations give to the opposite party, that no apology seems necessary for giving the case at large. It has already been cited in
i Saund.

But notwithstanding this, it was adjudged for the plaintiff, because, as *Twyden* declared, it was only an action for damages, and the defendant might aid himself on the writ of inquiry; and if he had traversed in the disjunctive, and issue had been joined upon it, the defendant might give in evidence any such matter in mitigation of damages. And as it seemed to me, he did not comprehend the difference urged by the defendant, but without any great consideration a writ of inquiry was awarded (24).

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1 Saund. 346. *Mellor v. Spateman*, note (2).

(23) The word average has two significations in policies; it means a *particular partial loss*, which is the sense in which it is used in this case; and it also means a *contribution to a general loss*. 3 Burr. 1555. *Wilson v. Smith*. The former signifies a damage which a ship or cargo may have sustained in the course of the voyage, from any of the perils insured against, although the ship or cargo, or the greater part of the cargo, arrives in port. The latter is, where the master of a ship in distress, for the preservation of the whole, and with a view to prevent a total loss of the ship and cargo, either cuts away masts or cables, or throws some of the goods overboard, to lighten the vessel (which is what is meant by jettison or jetson), there, the loss, of what is so sacrificed for the common welfare, is brought into a general or gross average, and all who are concerned in the ship, freight and cargo, are to bear an equal or proportional part of such loss, and that must be made good by the insurers in proportion to the sums by them respectively underwritten. This obligation, which binds the proprietor of

the goods or ship saved to contribute to the relief of those whose goods are thrown overboard, is founded on the great principle of distributive justice; for it would be hard, that one man should suffer by an act, which the common safety rendered necessary; and that those who received a benefit from that act should make no satisfaction to him who had sustained the loss. Park. Insur. 121.

Nearly allied to average is the case of *salvage*, which is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates or enemies. See statutes 12 Ann. st. 2. c. 18. 26 Geo. 2. c. 19. and 33 Geo. 3. c. 66. s. 42.

(24) However, the judgment of the court appears to be well founded, and warranted by the case of *Osborne v. Rogers*. 1 Saund. 267. For where an action is brought *for damages*, in which the plaintiff is by law entitled to recover *in proportion* to the loss or injury he has actually suffered, it seems to follow, that a traverse, which ties him up to prove the *whole* damage stated in his declaration before he can recover at all, is contrary to the principles of law which governs actions of this kind, and therefore

fore cannot be supported. It shall not be permitted to a defendant, by expressly traversing any allegation in the declaration by a formal traverse, to compel the plaintiff to prove more than he would be bound to do, if the defendant had pleaded the general issue only to the declaration. Now if the general issue had been pleaded, the plaintiff would not have been bound to have proved a loss of the *ship and all the other things* mentioned in the allegation, but it would have been enough for him to have shewn a loss of *part* only, and he would have recovered damages *accordingly*. 2 Burr. 204. *Gardiner v. Croasdale*. This circumstance seems to distinguish cases of this kind from those cases before cited out of *Yelverton* and *Dyer*. For where a party takes upon himself to state in any pleading a substantive averment, or allege a precise estate, which he is not bound to do, if they are material, and bear on the question, he gives the other side an advantage of traversing them. Thus, in the case in Dy. 365, it was necessary the plaintiff should shew he had *some right* to put his cattle into the close against which the defendant was bound to fence, otherwise the defendant was not bound to repair the fence against him. 2 H. Black. 527. *Dowdson v. Payne*; but a *seisin in fee* was not necessary to give that right; a term for *life* or *years*, or even an estate at *will*, or a *right of common*, or the owner's *licence*, would have conferred that right full as well. The plaintiff however, thought proper to allege that the right he had arose from a *seisin in fee*; therefore the defendant was at liberty to deny that right, as much as any other right which

the plaintiff might have had, to put his cattle into the close. So in the case in Yelv. 195, the ground of the plaintiff's action was that the defendant would not permit him to cut down the remaining 200 trees. In order to shew that so many trees were left standing in the wood, he stated that at the time of the agreement he had cut down *only* 800 trees. It is true it was not necessary for him to have stated that precise number, but having done so, and the number that were left being material to shew the damage which the plaintiff had sustained by the defendant's refusal to permit him to cut them down, he gave the defendant an advantage of traversing it. But where the allegation is not all material, the other side cannot traverse it; as where, in covenant by the plaintiff as assignee of J. P., the plaintiff declared that on such a day and year *J. P. was seised in fee*, and by indenture demised to the defendant at so much rent, who thereby covenanted to pay it, and then entitled himself to the reversion by lease and release, and assigned the breach in non-payment of the rent; the defendant pleaded that J. P., before the making of the demise to the defendant, conveyed the premises by lease and re-lease to J. B. in fee, and traversed that *J. P. at any time afterwards was seised in fee*; and on a general demurrer to the traverse, it was held, that the plea was ill on account of the generality of the traverse, which tied up the plaintiff to prove the estate alleged in the declaration; even a *disseisin* would have done in that case where it appeared the tenant enjoyed under the lease; and it was no answer to say that the defendant had traversed

in the words of the declaration; for to follow it. 2 Str. 818. *Palmer v. Ekins*. 6 Resolution.

Foxwist and others executors of Pinsent *versus* Case 40.
Tremaine.

Trin. 21 Car. 2. Regis. Rot. 1512.

MIDDLESEX, to wit, Be it remembered that on *Wednesday* next after 15 days of *Easter* last past, before our lord the king at *Westminster* came *William Foxwist* esq. Sir *John Saint Barbe* bart. *Edward Saint Barbe* gent. *William Pinsent* gent. and *Thomas Wasber* gent. executors of the last will and testament of *John Pinsent* esq. deceased, by *John Stone* their attorney, and brought here into the court of our said lord the king then there their certain bill against *John Tremaine* gent. in the custody of the marshal, &c. of a plea of trespass on the case, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words to wit: *Middlesex*, to wit, *William Foxwist* esq. Sir *John Saint Barbe* bart. *Edward Saint Barbe* gent. *William Pinsent* gent. and *Thomas Wasber* gent. executors of the last will and testament of *John Pinsent* esq. deceased, complain of *John Tremaine* gent. being in the custody of the marshal of the marshalsea of our lord the king before the king himself, for that whereas the said *John Tremaine* on the last day of *June* in the twentieth year of the reign of *Charles* the second, now king of *England*, &c. at the parish of *St. Clement Danes* in the county aforesaid, was indebted to the said *John Pinsent* in his life-time, in 15l. of lawful money of *England*, for money due to the said *John Pinsent* in his life-time for damage-clear (b), as one of the prothonotaries of the court of common bench at *Westminster* in the county of *Middlesex*, and by the said *John Tremaine* before that time received to the use of the said *John Pinsent*, and the said *John Tremaine* afterwards, to wit, on the day and year aforesaid,

1. COURT for money had and received by defendant to the use of the testator.

(b) See Statute 17 Car. 2. c. 6.

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2. Money had
and received
by defendant
to the use of
plaintiffs as
executors.

(c) See ante,
227. d.

Breach

said, at the parish aforesaid in the county aforesaid, in consideration thereof undertook, and then and there faithfully promised the said *John Pinsent* in his life-time, that he the said *John Tremaine* would well and faithfully pay and content the said 15l. to the said *John Pinsent* or his executors. And whereas also the said *John Tremaine* afterwards, to wit, on the 1st day of *January* in the twentieth year of the reign of our lord *Charles* the second, now king of *England*, &c. at the parish aforesaid in the county aforesaid, was indebted to the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Washer* in other 15l. of lawful money of *England*, as executors of the last will and testament of the said *John Pinsent* esq. deceased, for so much money due to the said *John Pinsent* in his life-time for damage clear, as one of the prothonotaries of the court of common bench at *Westminster* (the same court then and there being at *Westminster* in the county of *Middlesex*), and by the said *John Tremaine* after the death of the said *John* before that time received to the use of them the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Washer*, as (c) executors of the said *John Pinsent*, and the said *John Tremaine* afterwards, to wit, on the day and year last aforesaid, in consideration thereof undertook and then and there faithfully promised the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Washer*, that he the said *John Tremaine* would well and faithfully pay and content the said 15l. last-mentioned to the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Washer*: yet the said *John Tremaine*, not regarding his said several promises and undertakings, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *John Pinsent* in his life-time, and the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *John Washer* after the death of the said *John Pinsent* in this behalf, has not yet paid the said several sums of money above-mentioned, amounting in the whole to 30l. of lawful money of *England*, or any penny thereof, to the said *John Pinsent* in his life-time, or to the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*,
William

William Pinsent and *John Wasber*, after the death of the said *John Pinsent*, or either of them, according to his promise and undertaking aforesaid, nor has he hitherto in any manner contented the said *John Pinsent* in his life-time, or the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Wasber*, after the death of the said *John Pinsent*, or either of them, for the same, (although to do this the said *John Tremaine* was often requested by the said *John Pinsent* in his life-time; and although also to do this the said *John Tremaine* afterwards, to wit, on the 20th day of January in the aforesaid twentieth year of the reign of our lord the now king, at the parish aforesaid in the county aforesaid, was requested by the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *John Wasber*) but he the said *John Tremaine* altogether refused to pay the said several sums of money to the said *John Pinsent* in his life time, and to the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Wasber* or either of them, after the death of the said *John Pinsent*, and still refuses to pay the same to the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Wasber* or either of them, in delay of the faithful execution of the said will of the said *John Pinsent*; wherefore the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Wasber* say that they are injured and have damage to the value of 40l. and therefore they bring suit, &c. And they bring here into court the said letters testamentary of the said *John Pinsent*, by which it sufficiently appears to the court here, that the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinsent* and *Thomas Wasber* are executors of the said will of the said *John Pinsent*, and have the administration thereof, &c.

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And the said *John Tremaine* by *John Bishop* his attorney, comes and defends the wrong and injury, when, &c. and prays judgment of the said declaration (1), because he says that

(1) Where the defendant pleads in abatement of the writ a matter apparent on the face of it, he must both begin and conclude his plea with "praying judgment". P p 2

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that *John Saint Barbe* and *Edward Saint Barbe* two of the plaintiffs in the declaration mentioned, yet are, and each of them is, within the age of seventeen years, to wit, each of them of the age of thirteen years and no more, to wit, at the parish of *St. Clement Danes* aforesaid in the said county of *Middlesex*. And this he is ready to verify; wherefore he
prays

"*judgment of the writ*;" but where the plea in abatement is founded on some extrinsic matter out of the writ, such as jointenancy, excommunication, non-tenure, misnomer, and the like, it is said not to be formal *to begin* the plea with praying judgment of the writ, but only *to conclude* it with that prayer. Moor. 30. pl. 99. *per Dyer* and *Brown*. 1 Lutw. 11. S. P. However, where the writ is general as in debt, (in which the defendant is commanded to render the plaintiff a certain sum which he owes him, without shewing how the debt arose,) and the declaration, as it must do, explains in what way the debt mentioned in the writ became due to the plaintiff, whether by bond, or simple contract, or partly by one and partly by the other, or some other way; though there is no defect in the writ, but the cause of abatement arises from some extrinsic matter, such as that there are other persons not named who ought to be joined, or the like, still it is proper to pray judgment *of the writ*; but then the defendant must not in his plea rely upon matter appearing only in the declaration; for if he do, he must plead in abatement of *the declaration*, as well as the writ. 5 Term Rep. 553. *Harries v. Jamieson*. But where the writ is certain and particular, stating all the grounds of the action, and containing

the same number of counts as the declaration does, and is the same with the declaration in every respect, save only as to the addition of time, place and other circumstances that ascertain the generality of the writ, which is the necessary form of the writ in actions of trespass, assumpsit, trespass on the case, or the like, 2 Lord Raym. 910.; the defendant may plead such extrinsic matter in abatement by praying judgment of the writ only, though the matter which he relies on appears in the declaration, for, as in these cases, the whole cause of action appears in the writ as fully as in the declaration, the defendant cannot rely upon any circumstance in the declaration that does not appear equally in the writ. Clift. 2. pl. 2. Or he may in these cases pray judgment of both. Clift. 15. pl. 37. 1 Lutw. 14.

In a plea in abatement of *misnomer*, the defendant must not say, "that the said W. against whom the said plaintiff hath sued forth his said writ, or exhibited his said bill, by the name of R." because the defendant by the word *said* admits himself to be the person sued. 1 Show. 394. *Tallent v. Jermyn*. S. C. Carth. 207. Comb. 188. 1 Lutw. 10. 5 Term Rep. 487. *Roberts v. Moon*.

prays judgment of the said bill, and that the same bill may be quashed, &c.

And the said *William Foxwist, John Saint Barbe, Edward Saint Barbe, William Pinsent, and Thomas Washer* pray a day to imparl to the said plea, and it is granted to them, &c. And thereupon a day is thereof given to the parties aforesaid before

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The greatest precision and certainty possible is required in these cases. Cro. Jac 82. *Baker v Gough*; therefore a plea of misnomer concluding with praying, "if the bill," was held bad on demurrer, though the words, "and that the same may be quashed," were also added, because the plea omitted to pray judgment of the bill in the usual form. 3 Term Rep. 185. *Hixon v. Linns*. So the defendant, in a plea of misnomer of his *Christian* name, must give his *surname* as well as his true *Christian* name, although his true *surname* is used in the declaration. As where the defendant, being sued by the name of *John Spraggs*, pleaded in abatement thus, "and *he* against whom the plaintiff has exhibited his bill by the name of *John Spraggs*, in his proper person, comes and pleads that he was baptized by the name of *James*, to wit, &c. and by the *Christian* name of *James* has always since his baptism hitherto been called and known;" traversing in the usual form that he was ever known by the *Christian* name of *John*; and on demurrer it was holden, that the plea was defective in not setting out the *surname* as well as the *Christian* name of the defendant: for such a plea must inform the plaintiff what is the defendant's true name; and it is not sufficient to correct the plaintiff's mistake as to

the defendant's *Christian* name, without also either admitting that he was rightly designated by his *surname*, or calling himself by some *other* name. 8 Term Rep. 515. *Haworth v. Spraggs*.

All pleas of misnomer regularly and generally and almost always must be pleaded in person, and not by attorney, unless it be by a special warrant of attorney F. N. B. 63. A. 7th edit. 1 Lutw. 11. Bro. *Misnomer*. 55. 1 Ld. Raym. 117. *Britton v. Gradon*; though in Lill. Ent. 1 & 6. Lib. Plac. 1. Hans. Ent. 119. misnomer is pleaded by attorney. But whether, if pleaded by attorney, it is *demurrable* to, has occasioned some doubt. 1 Lutw. 11. and 3 H. 6. 55. are authorities in support of its being *demurrable* to; but the case of *Cremer v. Wickett*, 1 Ld. Raym. 509. seems to incline much the other way. There the defendant having pleaded a misnomer by attorney, to which the plaintiff demurred, Holt C. J. was of opinion, that it was a good cause to refuse the plea, but not to demur: and at another day the court gave judgment that the bill should be quashed. Nor can the defendant plead to the jurisdiction of the court by attorney, but only in person. Gilb. C. P. 187. 3d edit. 1 Bac. Abr. 2. So if a feme-sole contracts a debt, and afterwards marries, and is

Foxwist and others v. TREMAINE. before our lord the king at *Westminster*, until *Friday* next after the morrow of the holy *Trinity*, that is to say, to the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William* and *Thomas* to impail to the said plea, and then to reply. At which day before our lord the king at *Westminster* come the parties aforesaid by their attornies aforesaid, and the

sued as a feme sole, she must plead her coverture in abatement in person and not by attorney. Lill. Ent. 1. 2 Rich. P. C. P. 1.

It has been holden that a plea in abatement to the jurisdiction of the court, as well as other pleas in abatement, beginning with the words, "defends the wrong and injury when &c." is good; for though it be true that a defendant cannot plead in abatement after making a full defence, yet these words only amount to a half defence; for in general, the " &c." will imply only a half defence in cases where such a defence is to be made, and will be understood as making a full defence if a full defence is necessary; but if the plea goes on and says "and the damages and whatever else that he ought to defend;" &c. that amounts to a full defence, and after that the defendant cannot plead in abatement. Hard. 365. *Clapham v. Lenthall*. Willes's Rep. 40. *Alexander v. Mawman*. 8 Term Rep. 631. *Wilkes v. Williams*. Clift. Ent. 15. pl. 37. Brownl. Rediv. 199, 200. Hans. Ent. 102. pl. 3.: and the case of *Trundell v. Troxwell*. Sty. 273. Gilb. 188. 3 edit. 1 Lutw. 5. *Gawen v. Surby*, to the contrary, have been over-ruled. For the defendant must first make himself party by saying

"defends the force and injury when, &c." Carth. 220. *Ferrers v. Miller*. Willes's Rep. 41. It is not necessary to lay a venue in a plea in abatement that another person ought to have been sued with the defendant, because as the statute 4 Ann. c. 16 s. 6. has directed that the venue shall come from the body of the county, the principle now is, that the place laid in the declaration draws to it the trial of every thing that is transitory. 7 Term Rep. 243. *Neale v. De Garay*. See 1 Saund. 8. note (2).

If a plea which contains matter in bar of an action concludes in abatement, it is a plea in bar, notwithstanding the conclusion, and final judgment shall be given upon it; for if the plaintiff has no cause of action, he can have no writ. So if a plea, which contains matter only in abatement, concludes in bar, it is a plea in bar, and final judgment shall be given, because by praying judgment if the plaintiff shall maintain his action, the defendant admits the writ to be good, 37 H. 6. 24. a. per *Prisot*. Bro. Brief. 236. S. C. 36 H. 6. 18. a. per *Littleton*. Bro. Brief. 247. S. C. 2 Ld. Raym. 1018. *Crosse v. Bilson*. 6 Mod. 103. S. C. 1 Lutw. 42. *Wallis v. Savil*. Cro. Eliz. 202. *Isam v. Hitchcock*. 1 Mod. 239. *Justice v. Whyte*. 12 Mod. 524, 525. *Slarney v. Slarney*. 1 Sid.

the said *William, John Saint Barbe, Edward, William and Foxwistand Thomas* say, that for any thing by the said *John Tremaine* above in pleading alleged, the said bill of the said *William, John Saint Barbe, Edward, William and Thomas* against him the said *John Tremaine* ought not to be quashed, because they say that the said plea by the said *John Tremaine* in manner

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(Sid. 189, 190. *Burden v. Ferrers*. S P. And the difference supposed to have been taken by Lord *Holt*, in 1 Show. 4. *Carneth v. Prior*, and Comb. 107. S. C., on the above-cited case of 36 H. 6. 18. a. namely, that a plea which begins in bar and concludes in abatement is a plea in abatement, and *vice versa*, a plea beginning in abatement and concluding in bar, is a plea in bar, seems to be a mistake of those reporters, as far as respects the *first* distinction; because it is not only not warranted by, but is directly contrary to, what was held by *Littleton* in that case. So likewise a plea which begins in bar, though it contains matter in abatement, and concludes in abatement, is a plea in bar, and final judgment shall be given. 1 Lev. 311, 312 *Cole v. Greene*. 2 Ld. Raym 1018. *Crosse v. Bilson*.

As to the *form* of pleas in abatement, it is said, that if the action be brought by original, the plea in abatement must begin and conclude with "praying judgment of the writ;" but the rule must be understood with this restriction, that the plea is for a matter apparent on the writ, otherwise it is not formal to begin so, according to what has been already observed in the beginning of this note. So if the defendant plead to the writ and declaration, the plea must pray judgment "of the writ and

"declaration." 5 Mod. 132. *Leaves v. Bernard*. If the action be by bill, the plea must pray "judgment of the bill," for if it pray judgment of the declaration, or of the bill and declaration, it is bad because the bill and declaration are the same thing. 5 Mod. 144. *Lee v. Barnes*. On this ground the plea in the present case seems to be informal in praying judgment of the declaration in the beginning of it, though it concludes right by praying judgment of the bill; and perhaps the word *declaration* may have been inserted by mistake instead of *bill*. If a plea in abatement begin and conclude with praying judgment "if he ought to answer to the said bill," it is bad, 5 Mod. 146. *Ewyer v. Cooke*. 1 Salk. 297, 298 S. C.; unless the plea be to the jurisdiction of the court, for then the plea is, "if he ought to answer," or "if the court will take cognisance." 5 Mod. 146. Lill. Ent. 3. 6, 7. 9. Clift 17. pl. 44. Lib. Plac 4. Or to the person, for in that case the prayer of the plea is "whether the defendant ought to answer." Latch. 178. *Cadman v. Grendon*. Lib. Plac. 8, 9. And if the defendant pleads that the plaintiff is excommunicated, he must not pray judgment of the writ, but "that he ought not to be answered." 3 Lev. 208. *Sturton v. Pierpoint*. Ibid. 210. *Hamp-*

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ner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law to quash the said bill of the *William, John Saint Barbe, Edward, William and Thomas* thereof against the said *John Tremaine*, to which they the said *William Foxwist, John Saint Barbe, Edward Saint Barbe, William Pinsent and Thomas Wasber* have no necessity, nor

son v. Bill; and the plea must conclude with praying, "that the suit may remain without day until," &c. 1 Lutw. 19. *Bradley v. Glynne*. Clift. Ent. 3. pl. 3. 11 pl. 28. 12. pl. 30. So if the death of one of the plaintiffs or defendants be pleaded, the defendant must not pray "judgment of the writ and that the same may be quashed," but, "if the court will proceed any further;" for the writ was in fact abated before by the death of the party. 3 Lev. 120. *Hallowes v. Lucy*; it being a general rule that every plea ought to have its proper and apt conclusion. Latch. 178.

A writ is divisible, and may be abated in part, and remain good as to the residue; and therefore the defendant may plead in abatement to part, and demur or plead in bar to the residue of the writ; the settled rule upon this head being, that if the plaintiff in his action, brought either upon a general writ, such as debt, detinue, account or the like; or on a certain and particular one, as assumpsit, trespass, case, &c.; demands two things, and it appears by his own shewing, that he cannot have an action, or better writ for one of them, the writ shall not abate in the whole, but stand for so much as is good; but if it appears that he has a cause of action for both the things demanded, but the writ is not the proper writ for one of them, but he

may have another for it in another form, the whole writ shall abate. 11 Rep. 45. b. *Godfrey's case*. 1 H. 5. 4. b. 9 H. 7. 4. a. b. *per Vavisor and Brian*. 1 Roll. Rep. 11. *Childe v. Durrant*. Ibid. 77. *Bullen v. Godfrey*. 1 Saund. 285. *Duppa v. Mayo*. Gilb. C. P. 259. 260. 3d edit. 5 Term Rep. 5:7. *Herries v. Jamieson*, *per Asburst J.* A: in detinue of a box with charters and muniments concerning the plaintiff's inheritance, the plaintiff declared of four charters come to the defendant's hands by trover, and entitled himself well to three, and it appeared by his declaration that the fourth concerned land *whereof the plaintiff and his wife were jointly seised*; but because this went to the action as to the husband, for he alone in such case could not have another action, for that cause it was adjudged that the writ should stand good for the residue. So if executors bring an action on the statute 4 Edw. 3. c. 7. *de bonis asportatis in vita testatoris*, (see 1 Saund. 216. a. note) *for breaking the testator's close*, and taking away a certain sum of money in the testator's life time, though the writ will not lie for breaking the close, yet it is good for taking away the money. But where a man brings a writ of entry in the nature of an assize for two acres, and it appears by

nor are bound by the law of the land in any manner to answer. And this they are ready to verify; wherefore for want of a sufficient answer in this behalf, they the said *William Foxwist, John Saint Barbe, Edward Saint Barbe, William Pinsent and Thomas Washer* pray judgment, and their damages (2) on occasion of the premises to be adjudged to them, &c.

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by his own shewing that the proper writ for one of the acres is a writ of entry in the *per*, the whole writ shall abate, because he may have a better writ for that acre, and therefore he has misconceived his action as to that. 11 Rep. 45. b. 46. a. Hob. 178. *Andrews v. Delahay*. So where the plaintiff brought an action of assumpsit as *administrator*, and declared on four several promises, of which three were laid to the intestate, and the fourth was a general *insimul computasset* between the plaintiff and defendant of matters in the plaintiff's own right; on demurrer the court *ex officio* abated the whole bill, because the plaintiff had misconceived his action as to the *insimul computasset*, which was of a different nature from the three other demands, and required a different judgment, and the action for it ought to have been brought in his own right. Carth. 235. *Rogers v. Cooke*. S. C. 1 Show. 366. 1 Salk. 10. S. P. 1 Will. 171. *Hooker v. Quiller*. 2 Str. 1271. S. C. However where the writ is general, as if the plaintiff in debt demands 100l. in the writ, and the declaration states in the first count that 50l. parcel of the sum, was due upon simple contract, and in the 2d count that the remaining 50l. was due upon bond, and on oyer it appears that the bond was not then pay-

able, the whole writ will abate for a variance between it and the declaration; for by the plaintiff's own shewing it appears that he has demanded in his writ a larger sum than is due, and therefore the writ is not warranted by the declaration. Keilw. 31. b. *per Reade J.* 9 H. 7. 4. a. *per Vavifor*. 3 Mod. 41. *Marsh v. Cutler*. And this does not seem to be contradicted by the before cited case of *Andrews v. Delahay*. Hob. 178; for that was a suit *by bill*, and there was also a *verdict*, and the plaintiff entered a *nolle prosequi* to the bond not due; and Lord Hobart intimates a doubt whether it would have been good even then, if the suit had been by *original*: nor by the cases of *Aylett v. Lowe*. 2 Blac. 1221. and *Walker v. Witter*. Doug. 1. in which it is held, that it is not necessary that the plaintiff should in an action of debt recover the exact sum due, for no variance appeared in those cases between the writ and declaration; but it was a mere question of evidence, whether proof of a less sum due would support an action which demanded a greater sum. It is true, that in the case of *M^r Quillin v. Cox*. 1 H. Black 249. the declaration stated a less sum than was demanded in the writ, and still the action was held maintainable; but that case seems to be distinguishable; for in the first place the

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Joinder in de-
murrer.

And the said *John Tremaine* says, that the plea aforesaid by him the said *John Tremaine* in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in law to quash the said bill of them the said *William Foxwist, John Saint Barbe, Edward Saint Barbe, William Pinsent and Thomas Wasber* thereof against him the said

the variance appeared only between the recital of the writ and the declaration; and in the next the variance, if material, was not pleaded in *abatement* of the writ; but there was a *demurrer* to the declaration, and therefore no advantage could be taken, in that stage, of a matter which was only pleadable in *abatement*. And the question asked by the court in the case of *Herries v. Jamieson*. 5 Term Rep. 555, namely, whether if the second count had been bad, there would not then have been a variance between the writ and declaration as to the sum demanded, seems to confirm this rule; for if the second count had in that case been bad, it is presumed there would have been a variance, notwithstanding the case of *M^r Quillin v. Cox*, which was cited to shew that there would have been no variance; but as the court was of opinion that the second count was good, it was not necessary to decide that question. And there seems to be a difference between the case, where it appears manifestly that the plaintiff has demanded a less sum in his declaration, as where, for instance, the day of payment of one of the sums is not yet come, and where the sums in the declaration agree with the sum in the writ, but it is a question of law, whether a count, containing a part of that sum, can be supported; in the former case, the

whole writ abates for variance, but in the other, the defendant must demur to that count.

The before-cited case of *Herries v. Jamieson*, (5 Term Rep. 553), was an action of debt to recover 1066l. as expressed in the writ. The first count in the declaration was for 1000l. borrowed by the defendant of the plaintiff, and the second was for 66l. for interest upon a certain other sum. The defendant prayed judgment of the writ, because the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from the plaintiff, was borrowed of him by the defendant and five others (naming them) jointly and not by the defendant only. To this there was a special demurrer, shewing for cause, that the plea, though pleaded in *abatement* of the whole demand, did not extend to both the causes of action, but only to one of them, and that the defendant had not pleaded in *abatement* of the declaration, but of the writ merely, and had nevertheless relied upon matter appearing only in the declaration, without shewing any defect in the writ; and it was resolved by the court, that as the plea professed to answer the whole declaration, and yet gave an answer only to part, it was therefore bad; (See 1 Saund. 28. *Earl of Manchester v. Vale*, note (3): that

said *John Tremaine*, which said plea and the matter in the same contained, he the said *John Tremaine* is ready to verify and prove as the court here, &c. And because the said *William Foxwist*, *John Saint Barbe*, *Edward Saint Barbe*, *William Pinjent* and *Thomas Wasber* have not answered the said plea, nor hitherto in any wise denied the same, he the

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the two sums mentioned in the two counts must be taken to be two distinct sums that were not connected with each other, for one was for money borrowed, and the other for the interest of another sum lent by the plaintiff; that if the second count could not be supported, the defendant should have demurred to it and not pleaded in abatement to the whole declaration for a defect in one count, but have pleaded in abatement to one count, and demurred to the other; for a writ may be abated as to one count, and remain good for the other, according to the resolution in *Godfrey's case*. 11 Rep. 45. b.

But it must not be inferred from this case, that, where the defendant pleads that there are joint contractors, or obligors not named, or other matter of the like nature, he is bound to plead in abatement both of the declaration and writ. For if the defendant had pleaded, "that the said 1066l. alleged in the writ to be due and owing from the defendant to the plaintiff, if any such debt was due and owing at all unto the plaintiff, was due and owing from the defendant and other persons (naming them) jointly, and not from the defendant alone, and which said persons are still living, &c. and this, &c. wherefore inasmuch as the said other persons are not named

"in the said writ, the defendant prays judgment of the said writ, and that the same may be quashed," it should seem, that the plea would have been sufficient, without also praying judgment of the declaration. Clift. Ent. 4. pl. 6, 7. pl. 17. The objection to the plea in abatement, as far as regards this point, appears to have arisen from the defendant's pleading a matter which did not appear in the writ, but in the declaration, in abatement of the writ; therefore according to the distinction already noticed the defendant ought to have pleaded in abatement both of the declaration and writ.

Indeed, where it is intended to plead in abatement only of part of the writ, and the cause of abatement arises from some of the counts of the declaration, the defendant must plead in abatement of both. Thus where in debt, the declaration consisted of five counts, the 1st and 2d were upon bond, and the others upon simple contract; and the defendant, as to the 1st and 2d counts, pleaded *non est factum*, and then proceeded thus, "And as to the writ of the plaintiff, and the declaration founded thereon as to the 3d, 4th, and 5th counts, the defendant prays judgment of the said writ, and the said declaration as to the said 3d, 4th, and last counts, and that the said writ and declaration as to those

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*Curia advisare
vult.*

said *John Tremaine*, as before, prays judgment of the said bill, and that the said bill may be quashed, &c. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the parties aforesaid, before our lord the king at *Westminster*, until *Friday* next after the octave of the holy

Trinity

“ those counts may be quashed, because
“ he saith, that the said several supposed
“ debts or sums of money in the said
“ 3d, 4th, and last counts respectively
“ mentioned, if any such debts or sums
“ of money ever accrued or were due
“ and owing unto the plaintiff, were,
“ and each, and every of them were,
“ and was, due and owing from the
“ defendant jointly and together with
“ one R. D. unto the plaintiff, and not
“ from the defendant F. only, and
“ which said R. D. is still living, to
“ wit, at *Westminster* aforesaid in the
“ said county. And this the defendant
“ F. is ready to verify. Wherefore,
“ inasmuch as the said R. D. is not
“ named in the said writ and declara-
“ tion, the defendant F. prays judgment
“ of the said writ, and the said declara-
“ tion as to the 3d, 4th, and last counts
“ thereof, and that the said writ and
“ said declaration thereon founded as to
“ the said last mentioned counts may
“ be quashed:” and on demurrer to
this plea, it was objected that the plea
ought not to have prayed judgment of
the whole writ, because it goes only to
the three last counts of the declaration;
but the court was of opinion, that a
general writ of debt is divisible and may
be abated in part and remain good for
the residue. A jointenancy of parcel
shall not abate the whole writ, though

the demand be of a thing entire as of a
manor. Doc. Plac. 7. and though the
party demand judgment of the whole
writ, the court may abate it in part
only. Rast. Ent. 108. b. 109. a. 233.
For if the demand or petition of a plea
be too large, the court may abridge it,
and therefore they gave judgment that
so much of the said writ as regarded the
3d, 4th, and last counts of the declara-
tion, and also the 3d, 4th, and last
counts of the declaration, should be
severally quashed. 2 Bos. & Pull. 420.
Powell v. Fullarton and another.

But if the plaintiff himself acknow-
leges his writ false in the whole or in
part, the whole writ shall abate. 1 H.
5. 4. pl. 5. As where in debt the
plaintiff demands 30l., and it appears
by the plaintiff's own shewing that
he has no cause of action for 10l. parcel
of such debt. Hob. 279. Earl of *Clan-
rickard's* case. So where in trespass
against A. only, the plaintiff declared
that the defendant together with B. and
C. committed the trespass, his writ shall
abate, for by his own shewing he has
falsified his writ; but if trespass be
brought against A. and he plead that
the trespass was done by him and B.,
and that the plaintiff released B. and
the plaintiff traverses the release, his
action shall not abate. Hob. 164. *Solt
v. Bishop*

Trinity, to hear their judgment of and upon the premises, Foxwist and
for that the court of our said lord the king here is thereof not others v.
yet, &c. At which day before our lord the king at *Westmin-* TREMAINE.
ster, come the parties aforesaid by their attornies aforesaid,
whereupon all and singular the premises being seen, and by
the court of our said the king here fully understood, and
mature

v. *Bishop of Coventry*. See 1 Saund. 285,
6. *Duppa v. Mayo*, note 7.

By statute 4 Ann, c. 16. s. 11. it is
enacted, that no *dilatory* plea shall be
received in any court of record, unless
the party offering such plea do by affi-
davit prove the truth thereof, or shew
some probable matter to the court to
induce them to believe that the fact of
such dilatory plea is true. This statute
extends to pleas in abatement in criminal
cases, such as indictments, as well as in
civil cases. 3 Burr. 1617. *Rex v. Grain-
ger*. It is not necessary the affidavit
should be made by the party himself, if
it be made by his attorney it is suffi-
cient: for that affords probable cause
to induce the court to believe that the
plea is true, which is all that is required
by the statute. Barnes, 244. *Lumley v.
Foster*. If the plea be filed without an
affidavit it is considered as a mere nul-
lity, and the plaintiff may sign judg-
ment. See 2 Lord Raym. 1407. *Hughes
v. Alvarez*. 1 Str. 639. S. C.

It is observable that the statute does
not say that no plea in *abatement* shall be
received without an affidavit, but that
no *dilatory* plea shall be received without
one; therefore in the construction of
this statute it is holden, that it is not
confined to pleas in abatement, but ex-
tends to all *dilatory* pleas, though they
are not strictly pleas in abatement, be-

cause they do not go to the merits of
the action, but are in delay of it. Thus
where in a writ of right, the tenant who
was seised of the estate for the term of
his life only, prayed aid of him in the
reversion in fee, (which is the duty of
every tenant for life to do, if a writ of
right is brought against him, otherwise
the taking upon himself to join the mise
on the mere right will amount to a for-
feiture of his estate), it was holden, that
the plea of aid-prayer, though not a
plea in abatement, was yet a dilatory
plea within the statute 4 Ann. c. 16.
and required an affidavit of the truth of
it. 2 Bos. & Pull. 384. *Onslow v. Smith*.
So where in a *scire facias* against the
heir and terre-tenants of A., the sheriff
returned B. tenant of certain premises
whereof A. was seised in fee on the day
of giving the judgment or ever after-
wards, and that there was no other
tenant in his bailiwick whom he could
warn, and that there was no heir,—the
defendant pleaded that the plaintiff
ought not to have execution, because
there were other tenants of other pre-
mises (naming them) in the same coun-
ty, whereof the said A. was seised in
fee after the day the judgment was
given, who were not returned tenants
by the sheriff, and concluded his plea
in the same form with the plea in *Jes-
freson v. Morton*, (ante 8.) namely,
“wherefore

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 mature deliberation being thereupon had, for that it appears to the court here, that the plea aforesaid by him the said *John Tremaine*, in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient to quash the said bill of them the said *William, John Saint Barbe, Edward, William and Thomas* thereof against him the said *John*

“wherefore he prays judgment, if he ought to be compelled to answer the aforesaid writ of *scire facias* in form aforesaid returned.” This plea having been put in without an affidavit, the plaintiff signed judgment; and a rule being obtained to shew cause why the judgment shall not be set aside, it was argued against the rule by the plaintiff’s counsel, that though this was not a plea in abatement, because that must give a better writ, and here there is no defect in the writ, but in the sheriff’s return; and though the judgment of the court, in case the truth of the plea is admitted, is not, like the judgment on a plea in abatement, that the writ should be *quashed*; but the plaintiff prays another writ to warn the terre-tenants that are omitted, which is granted returnable on a particular return, and a *dies datus* is given to the plaintiff and the tenants returned in the former writ, to the day of the return of the said writ; (see the entry ante 8, 9. *Jeffreson v. Morten*. 2 Ld. Raym. 1255. *Adams v. Savage*. 2 Vent. 105. *Prynne v. Slougher*;) yet it was clearly a dilatory plea, inasmuch as it does not go to the merits of the *scire facias*; but because all the terre-tenants ought to contribute equally, the plea prays that execution should be delayed, and the merits of the *scire facias* postponed, until all the terre-tenants are

returned warned, and brought before the court; and therefore being a dilatory required an affidavit within the said statute of Anne, without which it was a mere nullity, and the plaintiff had a right to sign his judgment. And of that opinion was the whole court, and discharged the rule for setting aside the judgment. *Phelps, gent. administrator. v. Lewis, Clerk. Exchequer*, Trin. 41 Geo. 3. Indeed if the writ be special against the particular tenants by name, which is never the case now, though it seems to have been anciently the course, Bridg. 72. *Holland v. Jackson*, the plea, that there are other terre-tenants not named, would be in abatement of the writ, because there would then be a defect in the writ itself. 2 Salk. 601. *Adams v. Savage*.

(2) This manner of concluding a demurrer to a plea in abatement seems to be warranted by some precedents. In Rast. 473. b. 1 Lutw. 9. *Walsford v. Savil*, and Brownl. Rediv. 2. pl. 6. the demurrer concludes with “a prayer of damages, or debt and damages;” and in 1 Lutw. 29. *Young v. Case*, “that the said writ may be adjudged good and sufficient, and also with a prayer of damages:” but other precedents are to the contrary; in 1 Lutw. 19. *Bradley v. Glynne*. Ibid. 21. *Little v. Plant*, the conclusion is, “that the defendant

John Tremaine, it is considered by the court that the said *Foxwistand* and *John Tremaine* have a further day (3) to answer the said declaration of the said *William, John Saint Barbe, Edward, William* and *Thomas*, as in chief; and a further day is given by the said court of our said lord the king here to the said *John Tremaine*, until *Saturday* on the morrow of *St. Martin*, to answer

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TREMAINE.

Judgment of respondent ouster.

“defendant may answer the said writ;” and in *Brownl. Rediv. 2. pl. 5. Lev. Ent. 55. Clift. 23. pl. 61.* “that the “said writ or bill may be adjudged “good,” omitting in each case a prayer of the debt or damages; and in *1 Lutw. 26. Nares v. Huntingdon*, a demurrer to a plea in abatement, in a *scire facias* on a recognizance, concludes with praying judgment, and “that the said “writ may be adjudged good, and “execution against the defendant on “the recognizance.” However the better and proper form seems to be to omit the praying of damages, or debt and damages, and to conclude with praying judgment that “the writ or “bill may be adjudged good, and that the “defendant may answer further thereto;” for the plaintiff ought not to conclude in bar, but only affirm his writ; and if the demurrer be allowed, the judgment is not that the plaintiff shall have his debt or damages, but that the defendant shall answer over, as appears from the next note. And it has been adjudged, that where the plaintiff replies to a plea in abatement, and the defendant demurs to the replication, the plaintiff must not conclude his joinder in demurrer, “with praying judgment of his debt “or damages,” for to conclude in chief is wrong; but the plaintiff must pray that he may answer over, *1 Will. 302.*

Anon. S. P. Carth. 137. Biffe v. Harecourt. 1 Show. 155. 1 Salk. 177. S. C. The principle of which case seems to apply to the conclusion of a demurrer by the plaintiff to a plea in abatement; and in *1 Show. 255. Carter v. Davis. Carth. 187. 1 Salk. 218. S. C.* where the plaintiff demurred to a plea in abatement as in bar with praying judgment and damages, and the defendant joined as in bar, it was holden that the whole plea was discontinued, because the demurrer in bar was no answer to the plea in abatement, and a discontinuance of part is a discontinuance of the whole.

Since writing the above note, a case has been determined, which seems to confirm the observation made in it: where to a replication to a plea in abatement in assumpsit, the defendant demurred, and plaintiff joined in demurrer concluding with a prayer of judgment and damages: and judgment being given on the demurrer for the plaintiff in the C. B. that the replication was sufficient, and that the plaintiff ought to recover his damages, the plaintiff executed his writ of inquiry, and entered final judgment; but the judgment was reversed in the K. B., because the judgment on the demurrer was for the plaintiff to recover his damages, whereas it ought to have been for the defendant

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 Defendant pleads infancy.

answer the said declaration of the said *William, John Saint Barbe, Edward, William and Thomas*. At which day before our lord the king at *Westminster* come as well the aforesaid *William, John Saint Barbe, Edward, William and Thomas* by their attorney aforesaid, as the said *John Tremaine* by *John Tremaine* his attorney, and says that the said *William, John Saint Barbe, Edward, William and Thomas* ought not to have or maintain their said action thereof against him, because he says that he the said *John* at the said time of the several promises and undertakings in the said declaration above specified was within the age of 21 years, to wit, of the age of 20 years and

to answer over. 1 East. Rep. 542.
Bowen v. Shapcott.

(3) We have seen, that where the defendant pleads in abatement, and the plaintiff demurs to it, and the plea is disallowed by the court, the judgment is not final, but only *that the defendant answer over*. Yelv. 112. *Thompson v. Collier*. 1 Vent. 137. *Putt v. Nofworthy*. But if the plaintiff take issue upon a plea in abatement, and it be found against the defendant, then *final* judgment is given against him. Yelv. 112. *Thompson v. Collier*, per *Williams* justice. 1 Lev. 163. *Amcuts v Amcuts*. Sir T. Raym. 118. S. C. 1 Vent. 22. *Anon. Latch*. 178. *Cadman v. Grendon*. And if issue be taken on a plea in abatement to an action of assumpsit or case, and it be found for the plaintiff, he must take care that the same jury assess the damages in the action, otherwise a *venire de novo* must be awarded. As where in assumpsit for goods sold and delivered, the defendant pleaded misnomer in abatement; the plaintiff replied that the defendant was known as well by one name as the other; and issue being

joined thereupon the jury found for the plaintiff, but did not assess any damages; the court were of opinion, first, that the judgment must be peremptory, there being no difference whether the issue is joined upon a fact in a plea in abatement, or in a plea in bar; but upon a demurrer there shall be a *respondeas ouster*; and 2dly, that a *venire de novo* must be awarded, for the jury ought to have assessed the damages at the trial, and the omission could not be supplied by a writ of inquiry. 2 Will. 367. *Lichorne v. Le maitre*. And it is laid down by Lord Holt, that when a plaintiff takes issue upon a plea in abatement, he ought to pray damages; for if it be found against the defendant, final judgment shall be given; but where the plaintiff confesses and avoids the plea, and does not deny it, he cannot pray damages, but must maintain his writ. 1 Ld. Raym. 338. *Bonner v. Hall*. Ibid. 594. *Medina v. Stoughton*. 2 Ld. Raym. 1022. *Crosse v. Bilson*; which is another confirmation that the plaintiff must not pray damages unless he pleads to issue.

and no more, to wit, at the said parish of *St. Clement Danes* in the said county of *Middlesex*: and this he is ready to verify; wherefore he prays judgment if the said *William, John Saint Barbe, Edward, William* and *Thomas* ought to have or maintain their aforesaid action thereof against him, &c.

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And the aforesaid *William, John Saint Barbe, Edward, William* and *Thomas* say, that they, by any thing by the said *John Tremaine* above alleged, ought not to be barred from having their aforesaid action, because they say, that the said *John Tremaine*, at the said time of the several promises and undertakings in the said declaration above specified, was of the full age of 21 years and more, and not within the age of 21 years, in manner and form as the said *John Tremaine* has above in pleading alleged; and this they pray may be inquired of by the country, and the said *John Tremaine* likewise, &c.

Replication,
takes issue
thereon.

Therefore let a jury thereof come before our lord the king at *Westminster*, on _____ day next after _____ and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid there, &c.

**Foxwist and others Executors of Pinsent *versus* Case 41.
Tremaine.** [212]

Trin. 21 Car. 2. Regis, Rot. 1512.

ASSUMPSIT by *Foxwist, John Saint Barbe, Edward Saint Barbe*, and others, executors of *Pinsent*, late one of the prothonotaries of the common bench, by attorney against *Tremaine*. The defendant pleads in abatement, that the said *John* and *Edward Saint Barbe*, two of the plaintiffs, are within the age of 17 years, to wit, of the age of 13 years and no more, wherefore he prays judgment of the bill, &c. Upon which the plaintiffs demur.

S. C. & Sid.
449.
1 Lev. 299.
Sir T. Raym.
198.
1 Vent. 102.
2 Keb. 633.
1 Mod. 47. 72.
296.
All the executors
must join in an
action though
some of them are

under age; and they may all sue or appear by attorney; and such as are of full age may make an attorney for those who are within age.

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And this case was often argued, and two points were made; first, Whether the executors within the age of 17 years ought to join with the other executors of full age in this action, or whether the action ought to have been brought by the executors of full age only without naming the others within age? And second, Whether the executors within age may sue *by attorney* as well as the executors of full age?

(b) 1 Lev. 181.
Sir T. Raym.
198. S. C.

And as to the first point, a case between *Hutton* and *Muscal* (b) entered in this court Mich. 15. Car. 2. Rol. 703. was cited where a *scire facias* was brought by an executor on a judgment obtained by the testator; the defendant pleaded in abatement that there was another executor in full life not named in the writ; to which the plaintiff replied that this other executor was within the age of 17 years, and so not of age to take upon himself the executorship; and on demurrer it was ruled that the writ was well brought by the executor who was of full age alone, without naming the other who was within the age of 17 years, and this judgment was affirmed in the Exchequer Chamber; wherefore the counsel for the defendant concluded that in this case the executors within age ought not to have joined in this action.

And as to the second point, it was agreed by all, as well the counsel for the plaintiff, as the court, that if in any other case an infant sue or appear by attorney, where it is in his own right, it is error, if he be defendant (4), and the bill or writ may be abated by plea, if he be plaintiff (5). But the doubt in

(4) For in all actions real, personal, or mixt against an infant, if he appears by attorney, it is error. 1 Roll. Abr. 287. pl. 1, 2. Ibid, 747. pl. 13. Cro. Eliz. 519. *Sedburrough v. Raunt*. Moor. 460. *Randal's case*. 2 Leon. 189. *Boftwick v. Boftwick*. Cro. Jac. 234. *Odeil v. Moreton*. Sir W. Jones, 432. *Bishop of London against Lewys*. And if several defendants appear by attorney, and one is an infant, it is error, and as

the judgment is entire it shall be reversed against all. Cro. Jac. 289. *Bird v. Bird*. Ibid. 303. *King v. Marborough*. 1 Roll. Abr. 776. pl. 9. S. C. All. 74. *Oates v. Aylett*. 1 Lev. 294. *Grell v. Richards*. 1 I. d. Raym. 600. *per Raymond Arg.* And it is held, that though infant executors may sue, yet they cannot be sued by attorney. 2 Str. 783. *Frescobaldi v. Kinaston*.

(5) By statute 21 Jac. 1. c. 13. s. 2.

in this case was this, that the plaintiffs are executors, and some of them are of full age, and some within age, and yet all of them together represent the person of the testator, who cannot be of full age and within age at the same time. But it was said for the defendant, that an infant cannot make an attorney although he be executor, and so in *auter droit*; for he cannot make a warrant of attorney; and the matter had been clear, that if there be but one executor who is within the age of twenty-one years, he shall sue by guardian or *prochein amy* and not by attorney (c).

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But now this term it was adjudged for the plaintiffs by *Morton, Rainsford* and *Twyssden* justices, the chief justice being absent through indisposition; and as to the first point, they resolved that the action was well brought in the names of all the executors; and for this the case of *Smith and Smith* (d) was cited, where an action was brought in this court by bill by one executor who had proved the will, and the defendant pleaded another executor living not named in the bill, and the plaintiff averred the other executor to be within the age of 17 years, and yet because he was not named in the bill, it was abated by judgment.

(c) S. P. Carth.
123. C an v.
Bowles.
7 Show. 169.
S. C.

(d) Yelv. 130.

And as to the second point, it was resolved, that here being some executors of full age and some within age, those of full age may make an attorney for the others within age; as where husband and wife bring an action, they sue by attorney, but the wife cannot make an attorney, and therefore the husband makes an attorney for both. But *Twyssden* justice said, that his own opinion was that the infant executors

it is enacted, that after verdict for the plaintiff judgment shall not be staid or reversed, by reason that the plaintiff in ejectment, or other personal action or suit, being an infant under the age of 21 years, did appear by attorney therein; and by statute 4 Ann. c. 16. s. 2. after judgment by confession, *nil dicit, non sum informatus* in any court of record, or after writ of inquiry exe-

cuted. Before the statute of 21 Jac. 1. if an infant sued by attorney instead of by guardian, it was error, though judgment was given for him. Cro. Jac. 4. *Rees v. Long*. 1 Roll. Abr. 287. pl. 3. Cro. Eliz. 424. *Bartholomew v. Dighton*. And it appears above that now, since the statute, the plaintiff's infancy may be pleaded in abatement.

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OTHERS *v.*
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(e) Cro. Eliz.
542.

(f) Cro. Jac.
441.

(g) Cro. Eliz.
424.

(h) Fowkes *v.*
Childs.

could not sue by attorney, but the opinion of the chief justice and many others was to the contrary, as he said. And the case of *Bade v. Starkey* (e), where an infant sole executor brought an action by attorney and recovered, and on a writ of error in this court, that matter being assigned for error, it was over-ruled and the judgment affirmed; and yet this was before the statute 21 Jac. 1. c. 13. which aids this defect; and the case of *Cotton v. Westcot* (f), and 1 Roll. Abr. 288. where several cases are so adjudged. And because the defendant's plea was only in abatement, a *respondeas ouster* was awarded with the assent of *Twyfden* justice, although he was of the opinion aforesaid (g).

See the case where an infant brought an action by attorney and recovered; this matter being assigned for error after verdict, the judgment was reversed, *Bartholomew v. Dighton* (g): and see 3 Bull. 180. (h) that an infant executor ought to appear by guardian.—See also *Bridgman's* reports 73, 74, 75. many good cases concerning infancy and coverture.

(6) So in 1 Roll. Abr. 288. pl. 3. *Rutland v. Rutland*. Cro. Eliz. 378. S. C. it is said, that if an infant and a man of full age are made executors, they may bring an action as executors, and the infant may sue by attorney,

without making any prochein amy, because he sues in right of the testator, and not in his own right. And Lord Holt in the case of *Coan v. Bowles*. Carth. 123, 124. recognises this case of *Foxwist v. Tremaine*.

Case 41.
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Noell and others, executors of Noell, *versus* Nelson:

Mich. 21 Car. 2. Regis. Rot. 745. in B. R.

Error to the
House of Lords
after affirmance
in the King's
Bench.

CHARLES the second, by the grace of God, of England, Scotland, France and Ireland, King, defender of the faith, &c. to our right trusty, and well beloved Sir John Kelynge knt. our chief-justice assigned to hold pleas before us, greeting; because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court before

Sir

Sir *Orlando Bridgeman* knt. and bart. late our chief-justice of the bench, and his companions, then our justices of the bench, by our writ, between *William Nelson*, and Sir *Martin Noell* late of *London* knt., *Thomas Noell* late of *London* merchant, and *Georgo Robinson* late of *London* merchant, executors of the will of Sir *Martin Noell* knt. lately called Sir *Martin Noell* of *London* knt. of a plea that they the said Sir *Martin* executor, *Thomas* and *George*, render to the aforesaid *William* 100l. whereof they were convicted, and also in the adjudication of execution of the said judgment on our writ of *scire facias* issuing out of our same court at the suit of the said *William* against the said Sir *Martin* the executor, *Thomas* and *George* for the said 100l., and also in the affirmance as well of the judgment upon the said plea, as of the adjudication of execution upon our said writ of *scire facias*, in our court before us, as it is said, manifest error has intervened, to the great damage of the said Sir *Martin* the executor, *Thomas* and *George*, as by their complaint we are informed: we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, and adjudication of execution on our writ of *scire facias* be adjudged and affirmed before us as aforesaid, then you distinctly and openly without delay send the record and proceedings aforesaid, with all things concerning the same, to us in our parliament, and this writ; that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon, with the assent of the lords spiritual and temporal in the same parliament, for correcting that error, what of right, and according to the law and custom of our realm of *England* ought to be done. Witness ourselves at *Westminster* the 22d day of *June* in the 22d year of our reign.

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The record and proceedings of the plea whereof mention is within made, with all things concerning the same, I have brought with my own hands to our lord the king in his parliament within named, in a certain record to this writ annexed, as within I am commanded.

Answer.]

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Entry of a writ
of error from
the Common
Pleas to the
King's Bench.

Pleas before our lord the king at *Westminster* of the term of *St. Michael*, in the 21st year of the reign of our lord *Charles* the second now king of *England*, &c. Rot. 715.

Our lord the king hath sent to his right trusty and well beloved Sir *John Vaughan* knt. chief-justice of the bench his writ close in these words, to wit; *Charles* the second, by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c. to our right trusty and well-beloved Sir *John Vaughan* knt. our chief justice of the bench, greeting; because in the record and proceedings, and also in the giving of judgment in a plaint which was in our court before you and your companions, our justices of the bench, by our writ, between *William Nelson*, and Sir *Martin Noell* late of *London* knt. *Thomas Noell* late of *London* merchant, and *George Robinson* late of *London* merchant, executors of the will of Sir *Martin Noell* late of *London* knt. of a debt of 100l, which the said *William* demands of the said Sir *Martin*, *Thomas* and *George*, as it is said, manifest error has intervened, to the great damage of them the said Sir *Martin*, *Thomas* and *George*, as by their complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you send to us distinctly and openly under your seal the record and proceedings aforesaid, with all things concerning the same, and this writ, so that we may have them from the day of the *Holy Trinity* in three weeks wheresoever we shall then be in *England*; that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the law and custom of our realm of *England* ought to be done. Witness ourselves at *Westminster* the 29th day of *May* in the 21st year of our reign.

Norbury.

The answer of Sir *John Vaughan* knt. the chief-justice with-
in named.

The record and proceedings of the plaint whereof mention
is within made, with all things concerning the same, I send
before

before our lord the king wheresoever, &c. on the day within contained, in a certain record to this writ annexed, as within I am commanded.

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others v.
NELSON.

John Vaughan.

Pleas at *Westminster* before Sir *John Vaughan* knt. and his companions, justices of our lord the king of the bench, of the term of *St. Michael*, in the 18th year of the reign of our lord *Charles* the second, by the grace of God of *England, Scotland, France and Ireland*, king, defender of the faith, &c. Roll. 452.

London, to wit, Sir *Martin Noell* late of *London* knt. *Thomas Noell* late of *London* merchant, and *George Robinson* late of *London* merchant, executors of the will of Sir *Martin Noell* knt. lately called Sir *Martin Noell* of *London* knt. were summoned to answer *William Nelson* of a plea that they render to him 100*l.*, which they unjustly detain from him, &c. And whereupon the said *William* by *Thomas Brumstead* his attorney says, that whereas the said Sir *Martin Noell* the testator in his life-time, on the 11th day of *March* in the 17th year of the reign of our lord the now king, at *London* in the parish of *St. Mary le Bow*, in the ward of *Cheap*, by his certain writing obligatory acknowledged himself to be bound to the said *William* in the said 100*l.* to be paid to the said *William*, when he should be thereunto afterwards requested. Yet the said Sir *Martin Noell* the testator in his life-time, and the said Sir *Martin Noell* executor, *Thomas Noell* and *George Robinson*, after the death of the said Sir *Martin Noell* the testator (although often requested) have not rendered the said 100*l.* to the said *William*, but have refused to render the same to him, and the said Sir *Martin Noell* the executor, *Thomas Noell*, and *George Robinson*, do yet refuse to render the same to him, and unjustly detain the same; wherefore he says that he is injured, and has damage to the value of 10*l.* and therefore he brings suit, &c. And he brings here into court the writing aforesaid, which testifies the debt aforesaid in form aforesaid, the date whereof is the same day and year aforesaid, &c.

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Dⁿ d
against the de-
fendants as
executors.

protest of the
bond.

And the said Sir *Martin*, *Thomas* and *George* by *John Paltock* their attorney come and defend the wrong and injury when, &c. and say that the said *William* ought not to have

Plea.
Pene admini-
stravit.

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or maintain his said action thereof against them, because they say that they have fully administered all the goods and chattels which were of the said Sir Martin the testator, at the time of his death, *and that they have no goods or chattels which were of the said Sir Martin the testator, at the time of his death in their hands to be administered, nor had on the day of the suing out of the original writ of the said William, nor ever (1) since.* And this they are ready to verify; wherefore they pray judgement if the said William ought to have his said action against them, &c.

Plaintiff takes
judgment of
assets in futuro.

And the said William, inasmuch as the said Sir Martin, Thomas and George by their said plea do not deny but that the said writing now here into court brought is the deed of the said Sir Martin the testator, nor but that the said debt in the said writing specified is a true and just debt yet unpaid, and

(1) The words in italics constitute an essential part of this plea, and the omission of them would be fatal on demurrer, as well in a general as a special, *plene administravit*. As where in assumpsit the defendant pleaded several outstanding bonds of the testator, "and that he had fully administered all the goods which were of the testator at the time of his death, or ever since, except goods and chattels to the value of 10l. which are not sufficient to satisfy the debts due on the said bonds, and which are charged therewith;" and on demurrer, the plea was adjudged bad by the whole court for want of the intervening clause, "*and that he has not any goods or chattels of the testator, or had on the day of the suing out of the said writ, or ever since.*" For the *plene administravit*, as there pleaded, refers to the time of the plea pleaded, and the defendant may have paid debts on contract without suit after the writ purchased and before the plea, which he may give in evidence on the trial, if

issue be joined on the *plene administravit* as there pleaded, and therefore the plaintiff has no other remedy but to demur. 3 Lev. 28. *Hewlet v. Framingham*. So the omission of the words, "*or ever since,*" is held to be an incurable fault; for perhaps the executor had assets after the commencement of the action with which he would be chargeable; and all the books and precedents direct that those words should be inserted in the plea. And the defect is not aided unless it be founded by verdict that he had no assets on the day of the plea pleaded, for that aids the fault in the bar, and makes it not material, but it is not so upon demurrer. Cro. Jac. 132. *Gewen v. Roll*. So the words "*on the day of exhibiting the bill,*" where the action is in the common pleas, or in the King's Bench by original, instead of "*on the day of suing out of the said writ,*" have been adjudged to be a fatal defect. 2 Lutw. 1637, 1638. *Coyel v. Deval*.

not satisfied or otherwise discharged, and inasmuch as the said *William* cannot deny but that the said Sir *Martin*, *Thomas* and *George* have not, nor on the day of the suing out of the original writ of him the said *William*, nor ever since hitherto, had any goods or chattels which were of the said Sir *Martin* the testator, at the time of his death in their hands to be administered, prays judgment of his debt aforesaid by him above demanded, to be levied of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death, and which shall hereafter come to the hands of the said Sir *Martin*, *Thomas* and *George* to be administered: therefore it is considered that the said *William* recover against the said Sir *Martin*, *Thomas* and *George* his debt aforesaid to be levied of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death, and which shall hereafter come to the hands of the said Sir *Martin*, *Thomas* and *George* to be administered. And the said Sir *Martin*, *Thomas* and *George* in mercy, &c. (1)

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Pleas at *Westminster* before Sir *Orlando Bridgman* knt. and bart. and his companions, justices of our lord the king of the bench, of the term of *St. Michael* in the 19th year of the reign of our lord *Charles* the second, by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c. Roll. 348.

London, to wit, The sheriff was commanded, that whereas *William Nelson*, lately in the court of our lord the king here, by the writ of our lord the king, impleaded Sir *Martin Noell* late of *London* knt., *Thomas Noell* late of *London* merchant, and *George Robinson* late of *London* merchant, executors of the will of Sir *Martin Noell* knt., lately called Sir *Martin Noell* of *London* knt., for a certain debt of 100l., which the said *William* in the same court of our said lord the king demanded of the said Sir *Martin*, *Thomas* and *George* as executors of the will of the said Sir *Martin* the testator as aforesaid. And whereas also the said Sir *Martin* the executor, *Thomas* and *George*

Entry of a writ
of *Scire facias*
upon that judgment.

(1) If the plaintiff take issue on the general or special plea of *plene administravit*, and it be found against him, he cannot have judgment of *assets quando acciderint*. See 1 Roll. Abr. 929. (B.) pl. 2. Bro. *Executor* 18, S. C.

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appearing in the said court of our said lord the king, they the said Sir *Martin* the executor, *Thomas* and *George* pleaded in bar of the action of the said *William*, that they had fully administered all the goods and chattels which were of the said Sir *Martin* the testator at the time of his death, and that they had no goods and chattels which were of the said Sir *Martin* the testator at the time of his death in their hands to be administered, nor had on the day of the suing out of the original writ of the said *William*, nor ever since; upon which said plea the said *William*, inasmuch as the said Sir *Martin* the executor, *Thomas* and *George* by their said plea did not deny but that the writing then brought into the court of our said lord the king was the deed of the said Sir *Martin* the testator, nor but that the said debt in the same writing specified was a true and just debt then unpaid and not satisfied, or otherwise discharged, and inasmuch as the said *William* could not deny but that the said Sir *Martin* the executor, *Thomas* and *George* had not, nor on the day of the suing out of the original writ of the said *William*, nor ever since until then, had any goods or chattels which were of the said Sir *Martin* the testator at the time of his death in their hands to be administered; whereupon afterwards in the same court of our said lord the king here, to wit, in the term of St. *Michael* in the 18th year of his reign, before Sir *Orlando Bridgman* knt. and bart., and his companions, justices of our said lord the king of the bench here, it was considered by the same court of our said lord the king that the said *William* should recover against the said Sir *Martin* the executor, *Thomas* and *George* his debt aforesaid to be levied of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death, and which should thereafter come to the hands of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, whereof they were convicted, as fully appears by the record and proceedings remaining in the said court of our said lord the king before his justices at *Westminster* here; and after the judgment aforesaid in form aforesaid given, divers goods and chattels which were of the said Sir *Martin* the testator at the time of his death to the value of the debt aforesaid, and more, came to the hands and possession

possession of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, and now are in the hands and custody of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, whereof they may satisfy the said *William* for the debt aforesaid, as by the information of the said *William* the king has been given to understand. And because, &c. that by honest, &c. he make known to the said Sir *Martin Noell* the executor, *Thomas* and *George* that they be here at this day, to wit, on the morrow of St. *Martin* to shew if any thing, &c. why the said *William* ought not to have execution against them for the debt aforesaid of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death being in the hands of them the said Sir *Martin* the executor, *Thomas* and *George* to be administered, if it shall seem expedient, &c.

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And now here at this day come as well the said *William* by *Edward Noell* his attorney, as the said Sir *Martin* the executor, *Thomas* and *George* by *John Pallocke* their attorney; and the sheriffs, to wit, Sir *Denis Gauden* knt. and Sir *Thomas Davies* knt. now return that they by A. P. and J. D., honest, &c. have made known to the said *George* to be here at this day to shew in form aforesaid; and that the said Sir *Martin* the executor and *Thomas* have nothing, &c. nor are found, &c. And thereupon the said *William* prays execution against the said Sir *Martin* the executor, *Thomas* and *George* of the debt aforesaid, to be levied of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death being in the hands of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, to be adjudged to him, &c. whereupon the said Sir *Martin* the executor, *Thomas* and *George* pray leave to imparl thereto here until the octave of St. *Hilary*, and they have it, &c. the same day is given to the said *William* here, &c.

Sheriff returns
one of the de-
fendants warned.

Nihil to the
others.

Pleas at *Westminster* before Sir *Orlando Bridgman* knt. and
part. and his companions, justices of our lord the king of the
bench, of the term of St. *Hilary* in the 19th and 20th years
of the reign of our lord *Charles* the 2d, by the grace of God,
of

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Entry of a de-
claration in
Scire facias on a
judgment of
assets in futuro.

of *England, Scotland, France and Ireland*, king, defender of the faith, &c. Rot. 1702.

Heretofore, as appears in the term of *St. Michael* last past, Roll, 348. it is thus contained.

London, to wit, The sheriff was commanded, that whereas *William Nelson* lately in the court of our lord the king here by the writ of our said lord the king impleaded Sir *Martin Noell* late of *London* knt., *Thomas Noell* late of *London* merchant, and *George Robinson* late of *London* merchant, executors of the will of Sir *Martin Noell* knt., lately called Sir *Martin Noell* of *London* knt., for a certain debt of 100l. which the same *William* in the same court of our said lord the king demanded of the said Sir *Martin*, *Thomas* and *George* as executors of the will of the said Sir *Martin* the testator as aforesaid; and whereas also the said Sir *Martin* the executor, *Thomas* and *George* appearing in the said court of our lord the king, they the said Sir *Martin* the executor, *Thomas* and *George* pleaded in bar of the action of the said *William* that they had fully administered all the goods and chattels which were of the said Sir *Martin* the testator at the time of his death, and that they had no goods and chattels which were of the said Sir *Martin* the testator at the time of his death in their hands to be administered, nor had on the day of the suing out of the original writ of the said *William*, nor ever since; upon which said plea the said *William*, inasmuch as the said Sir *Martin* the executor, *Thomas* and *George* by their said plea did not deny but that the said writing then brought into the court of our said lord the king was the deed of the said Sir *Martin* the testator, nor but that the said debt in the same specified was a true and just debt then unpaid and not satisfied, or otherwise discharged, and inasmuch as he the said *William* could not deny but that the said Sir *Martin* the executor, *Thomas* and *George* had not, nor on the day of the suing out of the original writ of the said *William*, nor ever since until then, had any goods or chattels which were of the said Sir *Martin* the testator at the time of his death in their hands to be administered; whereupon afterwards, in the same court of our said lord the king here, to wit, in the term of *St. Michael* in the 18th year of his reign, before Sir *Orlando Bridgeman* knt. and bart., and his companions,

companions, then justices of our said lord - the king of the bench here; it was considered by the same court of our said lord the king that the said *William* should recover against the said Sir *Martin* executor, *Thomas* and *George* his debt aforesaid to be levied of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death, and which should thereafter come to the hands of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, whereof they are convicted, as fully appears by the record and proceedings thereof remaining in the said court of our said lord the king before his justices at *Westminster* here; and after (2) the judgment aforesaid in form aforesaid given, divers

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(2) It seems necessary to state that the assets came to the executor's hands *after* the judgment; for the *scire facias* must pursue the terms of the judgment, which, in this case, are that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor. Therefore where a *scire facias*, on such a judgment as this of assets *quando acciderint*, stated that divers goods, &c. of the testator sufficient to pay, &c. had come to and were in the hands of the defendant to be administered, &c. without stating that those goods had come to the defendant's hands *since the judgment*, and prayed execution against the defendant to be levied of those goods according to the form and effect of his said recovery, &c.; the defendant pleaded that *after the plaintiff's judgment* no goods, &c. of the testator had come to the defendant's hands to be administered, &c.; to which the plaintiff replied that divers goods, &c. had come to the defendant's hands, without adding *since the judgment*; and on de-

murrer it was adjudged that the *scire facias* was wrong for want of the words "*after the judgment.*" For when an executor pleads *plene administravit*, the plaintiff may either deny, or admit that allegation; if he admits it, he takes judgment and prays that his debt may be levied of such assets as may *afterwards* come to the hands of the executor to be administered; the praying of judgment is an admission that there are no assets in the executor's hands at that time. And this entry in *Saunders* is, "which should *thereafter* come to the hands of the said Sir *Martin* the executor, &c." And in debt or *scire facias* on this judgment, proof of the executor's receiving assets is always at the trial confined to a period subsequent to the judgment. Bull. Nis. Pri. 169. *Taylor v. Holman*. And it is right that such should be the rule of law; for if a creditor was permitted to litigate a second time that which has been once settled between the parties either by verdict, or admission, an executor would be harassed and involved in infinite expence

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divers goods and chattels which were of the said Sir *Martin* the testator at the time of his death, to the value of the debt aforesaid and more, came to the hands and possession of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, and now are in the hands and custody of the said Sir *Martin* the executors, *Thomas* and *George* to be administered, whereof they may satisfy the said *William* for the debt aforesaid, as by the information of the said *William* the king has been given to understand. And because, &c. that by honest, &c. he make known to the said Sir *Martin* Noell the executor, *Thomas* and *George* that they be here at this day, to wit, on the morrow of St. *Martin* to shew if any thing, &c. why the said *William* ought not to have execution against them for the debt aforesaid of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death, being in the hands of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, if, &c.

Sheriffs return
one defendant
warned,

And now here at this day come as well the said *William* by *Edward* Noell his attorney, as the said Sir *Martin* the executor, *Thomas* and *George* by *John* Paltocke their attorney: And the sheriffs, to wit, Sir *Dennis* Gauden knt., and Sir *Thomas* Davies knt. now return that they by A. P. and J. D. honest,

pence and litigation. 6 Term Rep. 1.
Mara v. Quin.

Note. It was observed by Lord *Kenyon*, that it had occurred to him on looking into the precedents, that the ordinary mode of entering up a judgment of assets *quando acciderint* was not correct; for, as on the issue of *plene administravit*, no evidence could be given of assets after the writ sued out, if the judgment were only to affect assets received after the judgment, there was an interval between the commencement of the action and the judgment, in which if the executor received any assets, they could not be taken at all. His lordship therefore thought that the judgment in such a case ought to be

entered up in such a manner as to reach all assets received by the executor after the time of suing out the writ. Upon which Mr. Justice *Ashhurst* observes that as the plea of *plene administravit* was that "the executor hath not, nor had at the time of suing out the writ, nor at any time since any assets, &c." he saw no objection to the plaintiff's replying to the latter part of the plea, "that the executor had assets since," &c. if the facts were so. Ibid. 10. See 1 Saund. 336. note (10). *Hancocke v. Prowd*, the forms of entering up a judgment on the two pleas of *non assumpsit* and *plene administravit*, according to this opinion given by Mr. Justice *Ashhurst*.

&c.

&c. have made known to the said *George* to be here at this day to shew in form aforesaid, &c. and that the said *Sir Martin* the executor and *Thomas* have nothing, &c. nor are found, &c. Whereupon the said *William* prays execution against the said *Sir Martin* executor, *Thomas* and *George* of the debt aforesaid, to be levied of the goods and chattels aforesaid which were of the said *Sir Martin* the testator at the time of his death, being in the hands of the said *Sir Martin* the executor, *Thomas* and *George* to be administered, to be adjudged to him, &c. Whereupon the said *Sir Martin* the executor, *Thomas* and *George* pray leave to imparl thereto here until the octave of *St. Hilary*, and they have it, &c. The same day is given to the said *William* here, &c. At which day here come as well the said *William* as the said *Sir Martin* the executor, *Thomas* and *George*, by their attornies aforesaid, and thereupon the said *William*, as before, prays execution against the said *Sir Martin* the executor, *Thomas* and *George* of the debt aforesaid, to be levied of the said goods and chattels which were of the said *Sir Martin* the testator at the time of his death, being in the hands of the said *Sir Martin* the executor, *Thomas* and *George* to be administered, to be adjudged to him, &c.

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and nihil as to
the others.

And the said *Sir Martin* the executor, *Thomas* and *George* say, that the said *William* ought not to have execution against them of the debt aforesaid of the goods and chattels which were of the said *Sir Martin* the testator at the time of his death, being in the hands of the said *Sir Martin* the executor, *Thomas* and *George* to be administered, because the say that they have fully (3) administered all the goods and chattels which were of the said *Sir Martin* the testator at the time of his death, and that they have no goods or chattels which were of the said *Sir Martin* the testator at the time of his death in their hands to be administered, nor had on the day of the issuing of the said writ of *scire facias*, nor ever since. And this they are ready to verify. Wherefore they pray judgment if

Plea to the *Scire facias*.

That the defendants have
no goods of the
testator.

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• (3) The words "that they have fully administered the goods, &c." seem to be superfluous. The more formal and correct way of pleading ap-

pears to be, "that they have no goods or chattels, &c." omitting the preceding words, "that they had fully administered."

the

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the said *William* ought to have execution against them of the debt aforesaid of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death being in their hands to be administered.

Replication.

And the said *William* says, that he by any thing before alleged ought not to be barred from having his said execution against them of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death, being in the hands of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, because he says that the said Sir *Martin* the executor, *Thomas* and *George*, on the day of the issuing of the said writ of *scire facias*, to wit, on the 23d day of *October* in the 19th year of the reign of our lord the now king, had divers goods and chattels which were of the said Sir *Martin* the testator at the time of his death to the value of the debt aforesaid, wherewith they might satisfy the said *William* for the debt aforesaid, to wit, at *London* aforesaid in the parish of *St. Mary le Bow* in the ward of *Cheap*; and this he prays may be inquired of by the country, and the said Sir *Martin* the executor, *Thomas* and *George* likewise, &c. Therefore it is commanded to the sheriffs that they cause to come here on the octave of the purification of the blessed *Mary* 12, &c. by whom, &c. and who neither, &c. to recognise, &c. because as well, &c. At which day here come the parties aforesaid by their attornies aforesaid, and the sheriffs have not sent the writ. Therefore, as before, the sheriffs are commanded that they cause to come here in 15 days from the day of *Easter* 12, &c. to recognise in form aforesaid, &c. At which day here come the parties aforesaid, &c. and the sheriffs have not sent the writ; therefore, as before, the sheriffs are commanded that they cause to come here on the morrow of the holy *Trinity* 12, &c. to recognize in form aforesaid, &c. At which day here come the parties, &c. and the sheriffs have not sent the writ. Therefore, as before, the sheriffs are commanded that they cause to come here from the day of *St. Michael* in three weeks 12, &c. to recognize in form aforesaid, &c. At which day come here the parties, &c. and the sheriffs have not sent the writ. Therefore, as before, the sheriffs are commanded that they cause to come here on the octave of *St. Hilary* 12,

Takes issue
thereon.

Venire facias.

*Viccomes non
misi breve.*

&c. to recognize in form aforesaid, &c. At which day come here the parties, &c. and the sheriffs have not sent the writ. Therefore, as before, the sheriffs are commanded that they cause to come here from the day of *Easter* in one month, &c. At which day the jury between the parties aforesaid in the plea aforesaid is respited between them here until this day, to wit, on the morrow of the ascension of our Lord in the 21st year of the reign of our lord the now king, unless Sir *John Vaughan* knt. chief-justice of our lord the king of the bench assigned by form of the statute, &c. shall first come on *Tuesday* the 18th day of *May* last past at the *Guildhall* of the city of *London*. And now here at this day comes the said *William* by his attorney aforesaid; and the said chief-justice before whom, &c. sent here his record in these words, that is to say: Afterwards on the day and at the place within contained before Sir *John Vaughan* knt. chief-justice of our lord the king of the bench, *Thomas Gerrard* being associated to him according to the form of the statute, &c. come as well the within-named *William*, as the within-written Sir *Martin* the executor, *Thomas* and *George*, by their attornies within contained; and the jurors of the jury whereof mention is within made being summoned, some of them, that is to say, D. K., H. S., H. M., N. D., B. D., T. H., T. G., and P. P., come and are sworn upon that jury; and because the residue of the jurors of the same jury do not appear, therefore others of the by-standers, being chosen for this purpose by the sheriffs of the said city, at the request of the said *William*, and by the command of the said chief-justice, are appointed anew, whose names are annexed to the within-written panel, according to the form of the statute in such case made and provided; which said jurors so appointed anew, that is to say, W. R., E. L., J. C., and T. C., being called likewise come, who, together with the said other jurors before impanelled and sworn, being chosen, tried and sworn to speak the truth of the within-contained, say upon their oath that the said Sir *Martin* the executor, *Thomas* and *George*, on the day of the suing out of the within-specified writ of *scire facias*, to wit, on the within-written 23d day of *October* in the 19th year within specified, had divers goods and chattels, which were of the

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Nisi prius.

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Postea.

Talis.

Verdict that the
defendants had
divers goods of
the testator's.

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Judgment.

within-named Sir *Martin* the testator at the time of his death in their hands to be administered to the value of the debt within-written, whereof they could have satisfied the said *William* the debt within-specified, to wit, at *London* in the within-written parish of *St. Mary le Bow* in the ward of *Cheap*, as the said *William* has within in his replication alleged. Therefore it is considered that the said *William* have execution against the said Sir *Martin Noell* the executor, *Thomas* and *George* of the debt aforesaid, to be levied of the goods and chattels which were of the said Sir *Martin* the testator at the time of his death being in the hands of the said Sir *Martin* the executor, *Thomas* and *George* to be administered, &c.

Assignment of
errors.

General errors.

Afterwards, to wit, on *Saturday* after, three weeks of *St. Michael* in this same term, before our lord the king at *Westminster* come the said Sir *Martin Noell* the executor, *Thomas* and *George* by *Martin Stampe* their attorney, and say that in the record and proceedings, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record and proceedings aforesaid it appears, that the judgment aforesaid in the plea aforesaid was given for the said *William* against the said Sir *Martin Noell* the executor, *Thomas* and *George*, whereas by the law of the land of this realm of *England*, judgment in that plea ought to have been given for the said Sir *Martin Noell* the executor, *Thomas* and *George* against the said *William*, and therefore in that there is manifest error; there is also error in this, to wit, that the declaration aforesaid and the matter in the same contained are not sufficient in law for the said *William* to have or maintain his aforesaid action against the said Sir *Martin Noell* the executor, *Thomas* and *George*, and therefore in that there is manifest error; and there is likewise error in this, to wit, that the said writ of *scire facias* and the matter in the same contained are not sufficient in law for the said *William* to have his execution against the said Sir *Martin Noell* the executor, *Thomas* and *George*, and therefore in that likewise there is manifest error; and thereupon the said Sir *Martin Noell* the executor, *Thomas* and *George* pray the writ of our lord the king to warn the said *William* to be before our lord the king to hear the record and proceedings aforesaid, and it is granted to them, &c. whereupon it is commanded the sheriff, that by honest, &c. he
make

make known to the said *William* that he be before our lord the king from the day of *St. Martin* in 15 days wheresoever he shall then be in *England* to hear the record and proceedings aforesaid if, &c. and further, &c. the same day is given to the said Sir *Martin Noell* executor, *Thomas* and *George*, &c. At which day before our lord the king at *Westminster* come the said Sir *Martin Noell* the executor, *Thomas* and *George* by their attorney aforesaid: and the sheriff has not sent the writ thereof; and the said *William* on the fourth day of the plea being solemnly called likewise comes by *Robert Braborne* his attorney; whereupon the said Sir *Martin Noell* the executor, *Thomas* and *George*, as before, say that in the record and proceedings aforesaid, and also in giving the said judgment there is manifest error, alleging the said errors by them above in form aforesaid alleged, and pray that the judgment aforesaid for the errors aforesaid, and others being in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have left by occasion of the said judgment, and that the court of our lord the king here may proceed as well to examine the record and proceedings aforesaid, as the matters aforesaid above assigned for errors, and that the said *William* may rejoin to those errors.

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And the said *William* says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he likewise prays that the court of our said lord the king here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for errors, and that the judgment aforesaid may be in all things affirmed.

Joinder in error.

Curia advisare
vult.

And because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises, a day therefore is further given to the parties aforesaid before our lord the king until 15 days from the day of the *Holy Trinity* wheresoever, &c. to hear their judgment of and upon the premises, because the court of our said lord the king here is thereof not yet, &c. Whereupon all and singular the premises being seen and by the court of our said lord the king now here more fully understood, and as well the record and

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affirmed.

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proceedings aforesaid, as the said causes and matters by the said Sir *Martin Noell* the executor, *Thomas* and *George* assigned for error, being diligently examined and inspected, for that it appears to the court of our said lord the king now here that the record aforesaid is in nothing faulty or defective, and that there is no error in that record, it is considered that the said judgment be in all things affirmed and stand in its full force and effect, the said causes and matters above assigned and alleged for error in any wise notwithstanding; and it is further considered by the court of our said lord the king here that the said *William* recover against the said Sir *Martin Noell* the executor, *Thomas* and *George* £.20 adjudged to the said *William* by the court of our said lord the king here according to the form of the statute in such case made and provided for his costs, charges and damages which he has sustained on occasion of the delay of execution of the said judgment by reason of the suing out of the said writ of error, and that the said *William* have execution thereof, &c.

Afterwards, that is to say, on the 3d day of *December* in the 22d year of the reign of our lord *Charles* the 2d now king of *England*, &c. before our lord the king in his parliament come the said Sir *Martin Noell* the executor, *Thomas* and *George* by *Martin Stampe* their attorney, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest error in this, to wit, that the declaration aforesaid, and the matter in the same contained, are not sufficient in law for the said *William* to maintain his action against the said Sir *Martin Noell*, *Thomas* and *George*; therefore in that there is manifest error. There is also error in this, that by the record it appears that judgment is in form aforesaid given for the said *William* against the said Sir *Martin Noell*, *Thomas* and *George*, whereas by the law of this realm of *England* that judgment ought to have been given for the said Sir *Martin*, *Thomas* and *George* against the said *William*; therefore in that there is manifest error.

Joinder in error.

And the said *William* by *Robert Braborne* his attorney says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the court of our lord the king before our lord the king in his

his parliament here may proceed to examine as well the record and proceedings aforefaid, as the matters aforefaid above assigned for error, and that the judgment aforefaid may be in all things affirmed, &c. And because the court of our said lord the king here before the king himself in his parliament is not yet advised what judgment to give of and upon the premises, a day therefore is given to the parties aforefaid before our lord the king in his parliament until , wheresoever, &c. to hear their judgment of and upon the premises, for that the court of our lord the king here in his parliament is not yet advised thereof, &c.

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Afterwards, to wit, on the 26th day of *November* in the 22d year of the reign of our lord *Charles* the 2d now king of *England*, &c. a transcript (a) of the record and proceedings aforefaid between the parties aforefaid with all things concerning the same, by means of a certain writ for correcting errors prosecuted by the said Sir *Martin Noell* knt., *Thomas Noell* and *George Robinson* executors of the will of Sir *Martin Noell* late of *London* knt. upon the premises, was transmitted from the said court of our said lord the king here to our said lord the king in the present parliament; and the said Sir *Martin Noell*, *Thomas Noell* and *George Robinson* appearing in the said court of parliament, assigned several causes and matters for error in the record and proceedings aforefaid, for reversing and annulling the said judgment; to which the said *William Nelson*, appearing in the same court of the said parliament, pleaded that there was no error either in the record and proceedings aforefaid, or in giving the judgment aforefaid. And afterwards, to wit, on the 9th day of *January* in the said 22d year of the reign of our said lord the now king in the said court of parliament, as well the record and proceedings aforefaid, and the judgment aforefaid thereon given, as also the matters above assigned and alleged for error, being seen and by the court there diligently examined and fully understood, for that it seemed to the court of the said parliament that the said record was not in any thing faulty or defective, and that there was no error in the said record: Therefore it was then and there considered by the said court of the said parliament that the judgment aforefaid should be in all things affirmed, and stand

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Entry of proceedings and
affirmance in
the House of
Lords, and rem-
ittitur to the
King's Bench.
(a) Antea, 101.
m.

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in its full force and effect, the matters aforesaid for error assigned in anywise notwithstanding; and that the said *William Nelson* in the court of our said lord the king before the king himself should have his execution thereof against the said Sir *Martin Noell* knt., *Thomas Noell* and *George Robinson* according to the form and effect of the said judgment; and it was further considered by the said court of the said parliament that the said *William Nelson* do recover against the said Sir *Martin Noell* knt., *Thomas Noell* and *George Robinson* 10l. adjudged to the said *William* for his costs and charges which he had sustained on occasion of the delay of execution of the judgment aforesaid, on pretence of prosecuting the said writ of error. And thereupon the record and proceedings aforesaid are remitted by the court of the said parliament to the said court of our said lord the king before the said king himself, wheresoever, &c. and now remain in the said court of our said lord the king before the king himself,

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Mich. 22 Car. 2. Regis. Rot. 745. in B. R.

S. C. 1 Sid.
448.
1 Vent. 94.
1 Lev 286.
2 Keb 606.
631. 666. 671.
On *plene administravit* by an executor, the plaintiff may immediately take judgment of assets *quando acciderint*. A *miserericordia* entered against executors for their delay, because it was not said in the record that they came the first day.

ERROR in parliament by *Noell* and others executors of Sir *Martin Noell* against *Nelson*, on an affirmance in the king's bench, of a judgment in the common bench, where the plaintiff had declared against the defendants as executors of the said Sir *Martin* in debt upon bond; the defendants there pleaded *plene administravit* generally, on which plea the plaintiff in the common bench prayed his judgment of the debt to be of assets *quando acciderint*, according to the rule in 8 Rep. 134. a. *Mary Shipley's* case; and the court gave judgment accordingly, "and the said executors in *miserericordia*:" on which judgment the executors brought a writ of error in the king's bench, and insisted on the matter in law, that such judgment as this ought not to be given, notwithstanding the opinion in *Mary Shipley's* case; and of such opinion was

Twyden

Twyfden justice strongly, who denied the said opinion in *Mary Shipley's* case to be law, and relied much on the opinion of *Jones, Berkeley, and Croke* in the case of *Dorchester v. Webb*, Cro. Car. 372. where *Mary Shipley's* case is denied by them to be law: but *Kelynge* chief-justice, *Rainsford* and *Morton* justices held the judgment in the common bench good; and afterwards in *Trinity* term now past, a precedent being produced, where such a judgment was entered according to the opinion in *Mary Shipley's* case, *Twyfden* agreed that the judgment should be affirmed; but they took an exception to the judgment that "*the defendant should be in mercy;*" but the precedent being read it appeared that a *misericordiâ* was entered there also, wherefore the judgment was affirmed; on which affirmance this writ of error was brought in parliament.

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And now after the end of this term, it was argued before the lords in parliament that the judgment in the common bench, and also the affirmance of it in the king's bench, were erroneous, because a *misericordiâ* was entered against the executors, and so they were amerced to the king without any fault in them; for they had pleaded a true plea, which the plaintiff himself confessed to be so, and therefore they ought not to have been amerced. For an amercement is when the plaintiff sues out the king's writ without cause, which is so found by verdict or adjudged on demurrer, or the plaintiff does not prosecute it but becomes nonsuit; or where the defendant disobeys the king's writ, and delays the plaintiff of his right; so that always there ought to be a precedent offence. And *Magna Charta*, c. 14. says that "*Liber homo non amercietur nisi secundum modum delicti.*" So that there ought to be precedent *delictum*, for otherwise a man cannot be amerced *secundum modum delicti* where there is no *delictum*. And it is not the delay only on the defendant's part which will make him to be amerced; for if a *præcipe quod reddat* be brought against the defendant for debt, and the defendant impairs and uses other delays, yet if he afterwards shews for cause that he does not owe the money demanded, and it is so found, now though the defendant has delayed the plaintiff, yet he shall not be amerced, but the plaintiff.

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shall be amerced for suing out a writ without cause. And so the defendants in this case have shewn cause in the common bench why they could not obey the king's writ, namely, that they could not pay the debt demanded of them as executors because they had no assets, which matter the plaintiff confessed; therefore the defendants are not in any fault, but have shewn the truth of their case whereby they have excused their disobedience to the writ, wherefore they ought not to have been amerced. And although an amercement is now but a small sum, and is seldom or never levied, yet in the case of a nobleman the amercement is considerable, namely, an earl, viscount, or baron shall be amerced to 5l. and a duke, or marquiss shall be amerced to 10l. 2 *Inst.* 28. and consequently if a nobleman be an executor, and has no assets, and pleads, as the defendants in the common bench have pleaded, the truth of his case, yet if many actions should be brought against him, he would pay large sums for amercements without cause, which would be against law and justice.

But all this was over-ruled by *Vaughan* chief-justice of the bench, who supplied the place of the lord keeper in the House of Lords: for he said, that the amercement was for the amercement made for the delay; and though it was urged that it appeared by the record that the defendants pleaded the same day with the declaration, *Vaughan* said, then it should have been entered *that they came the first day*, and it not being so entered it shall not be intended that the defendants pleaded the first day; and therefore for the delay where the plaintiff recovers judgment as in this case, the defendant shall be amerced. But this seems to me not to be law, for in *quare impedit* if the bishop imparls and afterwards pleads that he claims nothing but as ordinary, whereupon the plaintiff has judgment against him, yet the bishop shall not be amerced (*b*), because he excuses himself from any wrong, although he has delayed the plaintiff; which seems a case in point; but notwithstanding this, the judgment was afterwards affirmed by the lords of parliament.

(*b*) But see *Cro. Jac.* 92r *Lancaster v. Low*, and *Hob.* 200.

Greene *versus* Cole.

Case 42.

CHARLES the 2d, by the grace of God, of *England, Scotland, France and Ireland*, king, defender of the faith, &c. to our trusty and well beloved Sir *John Vaughan* knt. our chief-justice of the bench, Sir *Matthew Hale* knt. chief baron of our exchequer, Sir *Christopher Turner* knt. another baron of our exchequer, Sir *Richard Rainsford* knt. late one other baron of our said exchequer, and now one of our justices assigned to hold pleas before us, and Sir *William Morton* knt. another of our justices assigned to hold pleas before us, greeting. Whereas by our letters patent of commission, under our great seal of *England*, lately directed to you the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, Sir *William Morton*, and to Sir *Wadham Wyndham* knt. now deceased, then one of our justices assigned to hold pleas in our court before us, reciting, that because on the behalf of *William Cole* esq. we were informed, that in the record and proceedings of a certain plaint which was before *William Bolton* then late mayor of the city of *London*, and Sir *Robert Vyner* knt. and bart. and Sir *Joseph Sheidon* knt. then late sheriffs of the said city, in the hustings of *London*, by our writ, between the said *William Cole* and *Henry Greene*, for that the said *Henry* committed waste, sale and destruction in houses in the parish of *St. Giles* without *Cripplegate London*, which he holds for a term of years of the said *William Cole*, as assignee of *John Hillard* gent. who demised the same to the said *Henry Greene* for the said term, to the disinheriting of the said *William Cole*, and against the form of the provision in such case provided, and also in the giving of judgment in the said plaint before Sir *William Peake* knt. then late mayor of the said city, and Sir *Dennis Gauden* knt. and Sir *Thomas Davies* knt. then late sheriffs of the said city, in the said court of hustings, as it was • said, manifest error had intervened, to the great damage of the said *William*, as by his complaint we were informed; and that we being willing that the error, if any there were, should in due manner be corrected, and full justice done to the parties

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parties aforesaid, assigned you the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, Sir *William Morton* and the said Sir *Wadham Wyndham*, five, four, three or two of you, our justices, to look over and examine the record and proceedings, as well in the said plaint which was by our said writ, as in the giving of judgment in the said plaint, with all things touching the same, in the presence of the said mayor and sheriffs of the said city of *London* to be thereto warned by you, five, four, three or two of you, if they chose to be present at the *Guildhall* of the said city, and to correct the error assigned in the record and proceedings aforesaid, or in the giving of judgment in the said plaint, if any there should be found to be, and to do full and speedy justice therein to the parties aforesaid, as according to the law of our realm of *England*, and the custom of the said city, should be just, and therefore we commanded you and the said Sir *Wadham Wyndham*, five, four, three, or two of you, that at a certain day which you, five, four, three, or two of you should appoint in that behalf, you, five, four, three, or two of you should go to the said *Guildhall* of the said city, and do and perform all and singular the premises in form aforesaid, doing therein what should appertain to justice according to the law of our realm of *England*, and the custom of the said city; and because on the behalf of the said *Henry Greene* we are now informed, that in the reversing of the said judgment, and also in the giving of judgment thereupon for the said *William Cole* against the said *Henry Greene*, before you the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford* and Sir *William Morton* our said commissioners, or some of you, by virtue of our said commission, as it is said, manifest error hath intervened, to the great damage of the said *Henry Greene*, as by his complaint we are informed: we being willing that the error, if any there, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if the first judgment given in the court of the hustings *London* be reversed before you, or some of you, and judgment be thereupon given for the said *William Cole* against the said

Henry

Henry Greene, then without delay you distinctly and openly send the record and proceedings aforesaid, with all things touching the same, to our present parliament, and this writ; that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon, with the assent of the lords spiritual and temporal in the same parliament, for correcting that error, what of right and according to the law and custom of our realm of *England* ought to be done. Witness ourself at *Westminster* the 13th day of *May* in the 22d year of our reign.

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The answer of the within-mentioned Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, and Sir *William Morton* to this writ. Return;

The record and proceedings within specified, with all things concerning the same, we certify to our lord the king in his present parliament, in a certain record to this writ annexed, as within we are commanded.

J. V., M. H., C. T., R. R., and W. M.

Be it remembered, that on *Wednesday* the 16th day of *December* in the 20th year of the reign of our lord *Charles* the second, by the grace of God, of *England*, *Scotland*, *France* and *Ireland* king, defender of the faith, &c. at the Guildhall of the city of *London*, come Sir *John Vaughan* knt. chief justice of our said lord the king of the bench, Sir *Matthew Hale* knt. chief baron of the exchequer of our said lord the king, Sir *Christopher Turner* knt. another baron of the exchequer of our said lord the king, and Sir *William Morton* knt. one of the justices of our said lord the king assigned to hold pleas before our said lord the king, assigned to look over, and examine the record and proceedings of a certain plaint, which was in the hustings of our said lord the king of *London*, before *William Bolton* late mayor of the city of *London*, and Sir *Robert Vyner* knt. and bart., and Sir *Joseph Sheldon* knt. then sheriffs of *London*, by the writ of our said lord the king, and also the giving of judgment in the said plaint, before Sir *William Peake* knt. late mayor of the said city, and Sir *Dennis Gauden* knt. and Sir *Thomas Davies* knt. late sheriffs of the said city, in the hustings of the said city, between *William Cole* esq. and *Henry Greene*, for that the said *Henry* committed waste, sale and destruction

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destruction in houses, in the parish of *St. Giles without Cripplegate London*, which he holds for a term of years of the said *William Cole*, as assignee of *John Hilliard*, who demised the same to the said *Henry* for the said term of years, to the disinheriting of the said *William Cole*, and against the form of the provision in such case provided, as it is said, in the presence of the then mayor and sheriffs of *London* aforesaid at the Guildhall of the said city, and to correct the error, if any happen to be found in the record and proceedings aforesaid, or in the giving of judgment in the said plaint, and to do full and speedy justice therein to the parties aforesaid according to law, and the custom of the said city; and *Sir William Turner* knt. now mayor of the said city of *London*, and *John Forth* and *Francis Chaplain* now sheriffs of the said city then and there came and returned upon the precept of the said justices to them directed, as upon the said precept is indorsed, &c.: whereupon the parties aforesaid being called, the said *William Cole* in his proper person comes and appears, and puts in his place *Robert Rawlins* his attorney against the said *Henry Greene* of and in the plea of the writ of error. And the said *Henry Greene* likewise appears in his proper person, and puts in his place *Thomas Moncke* his attorney against the said *William Cole* of and in the said plea, &c. And thereupon the said now mayor and sheriffs of the city of *London*, having had a respite of forty days allowed them by the said justices according to the custom of the said city, have a day to have the record and proceedings in the said plaint before the said justices at the Guildhall aforesaid, until the 29th day of *January* next coming, and the same day is then and there given to the parties aforesaid there, &c. At which said 29th day of *January* in the said 20th year of the reign of our said lord the now king of *England*, come here, to wit, at the Guildhall aforesaid before the said justices, as well the said now mayor and sheriffs of the said city, as the said *William Cole* by his said attorney, and the said *Henry Greene* by his attorney aforesaid; and thereupon a further day is given by the said justices to the said *Sir William Turner* knt. mayor of the city of *London*, and *John Forth* and *Francis Chaplain* sheriffs of the said city, to have the said record and proceedings in the said plaint

plaint before the said justices of the Guildhall aforesaid, until *Monday* the 8th day of *February* next coming, and the same day is given to the parties aforesaid to be then there, &c. At which said *Monday* the 8th day of *February* in the 21st year of the reign of our said lord the now king of *England*, &c. come here, to wit, at the Guildhall aforesaid, before the said justices as well the said mayor and sheriffs of the said city, as the said *William Cole* by his attorney aforesaid, and the said *Henry Greene* by his attorney aforesaid. And thereupon a further day is given by the said justices to the said Sir *William Turner* knt., mayor of the city of *London*, *John Forth* and *Francis Chaplain* sheriffs of the said city, to have the record and proceedings in the said plaint before the said justices at the Guildhall aforesaid, until *Tuesday* the 16th day of this instant month of *February* in the year last aforesaid, and the same day is given to the parties aforesaid to be then there, &c. At which said *Tuesday* the 16th day of *February* in the said 21st year of the reign of our said lord *Charles* the second now king of *England*, &c. come here, to wit, at the Guildhall aforesaid before the said justices, as well the said mayor and sheriffs of the said city, as the said *William Cole* by his said attorney, and the said *Henry Greene* by his said attorney, and thereupon the said Sir *William Turner* knt. mayor of the city of *London*, and *John Forth* and *Francis Chaplain* sheriffs of the said city, by Sir *John Horwell* knt. recorder of the said city, certify *ore tenus*, according to the custom of the said city, the said record, whereof mention is made in the precept of the justices to them directed, and to the writ of error and commission annexed, as follows, that is to say : Common pleas holden in the hustings in the Guildhall of the city of *London* according to the custom of the said city, on *Monday* next before the feast of the conversion of *St. Paul*, in the 18th year of the reign of our lord *Charles* the 2d by the grace of God, of *England*, *Scotland*, *France*, and *Ireland* king, defender of the faith. At this hustings comes here into court *William Cole* esq. in his proper person, and brings here into court the writ of our said lord the now king, to the mayor and sheriffs of *London* directed, of waste done to houses in the parish of *St. Giles* without *Cripplegate London*, between the said *William*
Cole

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Cole plaintiff, and *Henry Greene* defendant, the tenor of which said writ follows in these words, to wit ; *Charles* the 2d, by the grace of God, of *England, Scotland, France* and *Ireland* king, defender of the faith, &c. to the mayor and sheriffs of *London* greeting ; *William Cole* esq. hath complained to us, that *Henry Greene* has committed waste, sale and destruction in houses in the parish of *St. Giles* without *Cripplegate London*, which he holds for a term of years of the said *William* as assignee of *John Hilliard*, who demised the same to the said *Henry* for the said term, to the disinheriting of the said *William*, and against the form of the provision in such case, and therefore we command you, that having heard the complaint of the said *William* in this behalf, and called the said parties before you, and heard their reasons, you cause to be done to the said *William* full and speedy justice, as of right according to the custom of the said city ought to be done, and as hitherto in the like case has been used and accustomed to be done, that we may no more hear his complaint in that behalf. Witness ourselves at *Westminster* the 18th day of *January* in the 18th year of our reign. And thereupon the said *William Cole* esq. in court here found pledges to prosecute the said writ, to wit, *John Doe* and *Richard Roe*, according to the custom of the said city, &c. and then and there in the said court the said *William Cole* put in his place *Robert Rawlins* his attorney against the said *Henry Greene* in the plea aforesaid, &c. and then and there in the said court by his said attorney, prayed process to be thereupon made to him against the said *Henry Greene* according to the custom of the said city, &c. and it is granted to him, &c. Whereupon in the said court at the prayer of the said *William*, made by his said attorney, the sheriffs of *London* were commanded by the court here according to the custom of the said city, that they summon by good summoners the said *Henry Greene*, that he be here in court at the next hustings of common pleas of *London* to be holden in the Guildhall of the said city, according to the custom of the city, &c. to answer the said *William Cole* in a plea of waste, and that the said sheriffs have then and there the names of the summoners by whom, &c. and that precept, &c. and the same day is given to the said *William Cole* to be here,

&c.

&c. At which day here at the hustings of common pleas of *London* holden in the said Guildhall of the city of *London*, according to the custom of the said city, on *Monday* next after the feast of the purification of the blessed virgin *Mary*, in the 19th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. the said *William Cole* esq. by the said *Robert Rawlins* his attorney comes and offers himself here in court, &c. against the said *Henry Greene* in the plea aforesaid, &c. and the sheriffs of *London*, to wit, Sir *Robert Vyner* knt. and bart., and Sir *Joseph Sheldon* knt., now certify and return to the court here on the said precept to them directed, that they by virtue of the said precept, by *John Good* and *Richard Rent*, good and lawful men of their bailiwick, summoned the said *Henry Greene* that he should be here at the said hustings to answer the said *William Cole* in the said plea of waste, &c. as by the said precept they were commanded, &c. And thereupon afterwards at the same hustings, the said *Henry Greene*, though solemnly called, doth not come, but makes default, whereupon at the said court at the prayer of the said *William* made by his said attorney, the sheriffs of *London* are commanded by the court here, that they put by sureties and safe pledges the said *Henry Greene*, that he be here in court at the next hustings of common pleas of *London* to be holden in the Guildhall of the said city, according to the custom of the said city, to answer the said *William Cole* in the said plea of waste, and that the said sheriffs should have then and there the names of those by whom, &c. and this precept, &c. and the same day is given to the said *William Cole* to be here, &c. At which said next hustings of common pleas of *London* holden in the Guildhall of the city of *London*, according to the custom of the said city, on *Monday* next before the feast of *Perpetua* and *Felicitas*, in the 19th year of the reign of our said lord *Charles* the 2d now king of *England*, the said *William Cole*, by the said *Robert Rawlins* his attorney, comes and offers himself here in court, against the said *Henry Greene* in his plea aforesaid, &c. and the sheriffs of *London*, to wit, Sir *Robert Vyner* knt. and bart., and Sir *Joseph Sheldon* knt., now certify and return to the court here upon the said precept to them directed, that the

said

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saïd *Henry Greene* was attached by pledges, to wit, *John Good* and *Richard Rent*, to be at the saïd hustings to answer the saïd *William Cole* in the plea aforesaid, as by the saïd precept they were commanded, &c. and thereupon at that same hustings the saïd *Henry Greene*, although solemnly called, doth not come, but makes default, whereupon at that same court, at the prayer of the saïd *William* made by his saïd attorney, the sheriffs of *London* are commanded by the court here, that they distrain the saïd *Henry Greene* by all his goods and chattels within the liberty of the saïd city, that he be here at the hustings of common pleas of *London*, to be holden in the Guildhall of the saïd city, to answer the saïd *William Cole* in the saïd plea of waste, and that the saïd sheriffs of the saïd city have then and there the names of those by whom, &c. and this precept, &c. the same day is given to the saïd *William Cole* to be here, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the city of *London*, according to the custom of the saïd city, on *Monday* next before the feast of *Benedict* the Abbot, in the saïd 19th year of the reign of our saïd lord *Charles* the 2d now king of *England*, &c. the saïd *William Cole*, by the saïd *Robert Rawlins* his attorney, comes, and offers himself in court here, &c. against the saïd *Henry Greene* in his plea aforesaid, &c. and the sheriffs of *London*, to wit, the saïd Sir *Robert Vyner* knt. and bart., and Sir *Joseph Sheldon* knt. now certify and return to the court here upon the saïd precept to them directed, that the saïd *Henry Greene* by virtue of the saïd precept was distrained by his goods and chattels to the value of ten shillings, so that he should be here at this hustings to answer the saïd *William Cole* in the saïd plea of waste, as they were above commanded, &c. and that the saïd *Henry Greene* was mainprised by *John Good* and *Richard Rent*. And thereupon afterwards at the same hustings, the saïd *Henry Greene*, being solemnly called, in his proper person comes and appears to the saïd writ of the saïd *William*, &c. And thereupon now here at this hustings the saïd *William Cole* complains of the saïd *Henry Greene* of a plea, wherefore, whereas it is provided by the common council of the realm of our lord the king of *England*, that it shall not be lawful for any person

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Declaration in
waste.

to commit waste, sale, or destruction in the lands, houses, or gardens demised to them for the term of life or years, the said *Henry Greene* did make waste, sale and destruction in houses, in the parish of *St. Giles* without *Cripplegate London*, which he (1) holds for a term of years of the said *William* as assignee of *John Hilliard* gent., who demised them to the said *Henry Greene* for the said term, to the disinheriting of the said *William* and against the form of the provision in such case provided. And whereupon the said *William Cole* by *Robert Rawlins* his attorney says, that whereas the said *John Hilliard* was seised of and in a certain messuage with the appurtenances, in the parish of *St. Giles* without *Cripplegate London*, in his demesne as of fee, and held it in free burgage of the city of *London*, and being so thereof seised, the said *John* on the 20th day of *April* in the year of our Lord 1650, at *London* aforesaid in the parish aforesaid, by a certain indenture between him the said *John*, by the name of *John Hilliard* of *Edmonton* in the county of *Middlesex* gent., of the one part, and the said *Henry* by the name of *Henry Greene* of the parish of *St. Giles* without *Cripplegate London* brewer, of the other part, (one part thereof sealed with the seal of the

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J. H. seised in fee of the premises in question.

By indenture demised the same to descendant.

(1) The writ of waste must charge the defendant either in the *tenet*, or *tenuit*, as it is called; that is, it must shew, whether at the time of the action the defendant still holds the premises, or whether the term under which he held them is expired. *Cro. Eliz.* 3, 6. *Sacheverel v. Bagnoll*. But in some cases the writ must be in the *tenet*, though the defendant be not tenant at the time of the action, and that through necessity, because there is no other form of writ. As if tenant for life commit waste, and afterwards grant over his estate, or the lessor enter for a forfeiture, or breach of a condition, the action must still be in the *tenet*. 2 *Roll. Abr.* 829. (F.) pl. 1, 4, 830. pl. 5, 6.

But waste against tenant for years after the determination of his term, either by effluxion of time, surrender, forfeiture, or breach of a condition, or against tenant *per autre vie* after the death of *cestui que vie*, must be in the *tenuit*. 2 *Roll. Abr.* 830, pl. 7, 8, 9. 5 *Rep.* 12 b. *Saunders's case*.

The declaration must charge the defendant either as lessee, assignee, executor, or administrator, and then only for such voluntary waste as has been committed by them respectively *Co.* Ent. 692, 693, 695. So if the defendant is tenant by devise, he must be so charged in the declaration. 2 *Roll. Abr.* 831. pl. 5. *Hutt.* 110. *Cook v. Cook*. *Co. Ent.* 700. b.

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to hold for 51
years,

who entered, and
was possessed.

J. H. devised
the reversion to
his son J. H.
for life, remain-
der to his first
and other sons
in tail, remain-

said *Henry* the said *William* brings here into court, the date whereof is the same day and year aforesaid) demised and to farm let to the said *Henry* the said messuage with the appurtenances, by the name of all that messuage, tenement or brew-house with the appurtenances, commonly called or known by the name or sign of the *Flower de Luce*, situate, lying and being in *Golding Lane*, in the said parish of *St. Giles without Cripplegate London*, together with all houses, edifices, buildings, yards, gardens, ways, waters, water-courses, lights, easements, profits, commodities, and hereditaments whatsoever, with their and every other appurtenances, to the said messuage, tenement, brew-house and premises belonging, or in anywise appertaining, or at any time before then used, occupied, or enjoyed with the same, and also together with all and singular pans, tuns, utensils, vessels, brewing utensils, implements and necessary things remaining and being within or about the said messuage, tenement or brew-house, contained and specified in a schedule annexed to the said indenture: To have and to hold all and singular the said messuage, tenement or brew-house, and all and singular the other premises demised by the said indenture, with their and every of their appurtenances, to the said *Henry Greene* his executors, administrators and assigns, from the feast of *St. John the Baptist* next following the date of the said indenture, to the full end and term of 51 years thence next following and fully to be complete and ended, as by the said indenture (among other things) more fully appears: by virtue of which said demise, the said *Henry* afterwards, on the morrow of the nativity of *St. John the Baptist* in the said year of our Lord 1650, entered into the said messuage with the appurtenances, and was and yet is thereof possessed, and the said *John* was seised of the reversion of the said messuage with the appurtenances in his demesne as of fee; and the said *John* being so seised thereof, he the said *John* afterwards, to wit, on the first day of *December* in the year of our Lord 1651, at *London* aforesaid in the parish aforesaid, made his last will and testament in writing, and thereby devised and bequeathed (among other things) the said reversion of the said messuage with the appurtenances to *John Hilliard*, the only son of the said *John Hilliard*

Hilliard the testator, for and during the term of his natural life, and after the decease of the said *John Hilliard* the son, then to the use of the first son of the body of the said *John Hilliard* the son lawfully to be begotten, and the heirs of the body of such son lawfully to be begotten; and for default of such issue, then to the use of the second son of the body of the said *John Hilliard* the son lawfully to be begotten, and the heirs of the body of such second son lawfully to be begotten; and for default of such issue then to the use of the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and every other son of the body of the said *John Hilliard* the son, successively one after the other, as they should be in seniority of birth and priority of age respectively, and the respective heirs of the body of every such son and sons lawfully to be begotten, the elder of such son and sons and the heirs of his body lawfully to be begotten, always to be preferred before the younger and the heirs of his body; and for default of such issue then to the use of all and every the daughter and daughters of the body of the said *John* the son lawfully to be begotten, and the heirs of their bodies lawfully begotten, and for default of such issue then the said *John Hilliard* the father by his said last will gave and devised the said reversion with the appurtenances to the said *William* his heirs and assigns for ever (2): and afterwards

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COLL.**

der to his daughters in tail, remainder to the plaintiff in fee.

(2) The declaration in waste must shew how the sheriff is intitled to the inheritance, *Hob* 84. *Skeat v. Oxenbride*; and therefore if the plaintiff declares upon a lease made by himself, the declaration must allege a seisin in fee, or in tail, in him, and a demise to the defendant, *Yelv.* 140. *Brewer v. Moile*; if upon a lease made by his ancestor, it must state a seisin in fee in the ancestor, a demise by him to the defendant, and a descent to the plaintiff, *Co. Ent.* 708. b. If the plaintiff claims as assignee of the reversion, he must shew his title to it, by grant or devise,

as is done in this entry. 2 *Roll. Abr.* 831. pl. 1, 2, 3, 4. *Co. Ent.* 692, 693. *Winch. Ent.* 1164. ed. 1680. 2 *Lutw.* 1543. *Leigh v. Leigh*: if by fine, the declaration must state the fine and the uses of it, *Co. Ent.* 700, 701. *Clift.* 819. pl. 5.; if by common recovery, it must set forth the recovery and the uses thereof *Winch. Ent.* 1139. 2 *Lutw.* 1541. *Leigh v. Leigh.* *Clift.* 814. pl. 3. If the plaintiffs sue as parceners, or jointenants, the declaration must allege them to be such, *Winch. Ent.* 1163.; if the plaintiff sues as rector, &c. in right of his church, he must shew that

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J. H. the son
died without
issue,

and plaintiff be-
came seised of
the reversion.

Defendant com-
mitted waste.

wards, to wit, on the 3d day of *February* in the said year of our Lord 1651, the said *John Hilliard* the father, at *London* afore said in the parish afore said, died seised of such his estate of and in the said reversion of the said messuage with the appurtenances; after whose death the said *John Hilliard* was seised of the said reversion of the said messuage with the appurtenances in his demesne as of freehold for the term of his life, the remainder thereof, after the death of the said *John Hilliard* the son, belonging as above in form afore said limited; and the said *John Hilliard* the son being so seised thereof, the remainder thereof as afore said belonging, the said *John Hilliard* the son afterwards, to wit, on the 6th day of *January* in the year of our Lord 1658, at *London* afore said in the parish afore said, died seised of such his estate therein, without any issue of his body begotten; after whose death he the said *William* was and yet is seised of the said reversion of the said messuage with the appurtenances in his demesne as of fee by virtue of the said last will and testament; and the said *William* being so seised thereof, and the said *Henry* being so as afore said possessed of the said messuage with the appurtenances, he the said *Henry* did make waste, sale, (3) and destruction

that he is so. *Ibid.* 1161. If husband and wife, in right of the wife bring the action, the declaration must state the reversion to be in both, namely, "that they are seised of the said reversion in their demesne as of fee in right of the wife." *Hob. 1, 2. Earl of Clanrickard v. Sidney.* It was indeed held by two judges against the opinion of the other two, that the words "*to the disinheriting*" do, *after verdict*, cure the want of stating the quantity of estate which the plaintiff was seised of, the declaration only alleging that the plaintiff *was seised*, without shewing what he was seised of. *Cro. Eliz. 57. Aston v. Whitnall*; but this seems very ques-

tionable. It is not necessary for the plaintiff to name himself assignee in the declaration; if he sets out his title specially as such, it is sufficient. 2 *Roll. Abr. 831. pl. 4.* And it is held, that though the writ is general, "whose heir he is," which *prima facie* implies a descent *in fee*, yet it is no variance to state in the declaration a *special inheritance in tail.* 1 *Leon. 48. Lewknor v. Ford.*

(3) The declaration must particularly specify the quality and quantity of the waste done; though to maintain the action the plaintiff is not bound to prove the *whole* waste as laid, but shall recover *pro tanto*; therefore where the waste

struction in the said house and messuage, that is to say, by prostrating a brew-house parcel of the said messuage of the price of 1000l., and taking away and selling the timber and roof thereof; and also by pulling down, pulling off, and carrying away four ale-tuns fixed to the said brew-house, each of them of the price of 5l., a copper of brass covered with lead likewise fixed to the said brew-house, of the price of 200l., a mash-tun likewise fixed to the said brew-house, of the price of 20l., a pump erected in the said brew-house, of the price of 5l., six brewing vessels called coolers made of timber likewise fixed to the said brew-house, each of them of the price of 6l., a malt mill with a small millstone belonging to the said mill fixed in the ground in the said brew-house, of the price of 20l., and a cistern made of a cement called Plaster of Paris, and fixed in the ground in the said brew-house, of the price of 10l., to the disinheriting (4) of the said William, and against the form of the provision in such case provided; wherefore he says that he is injured, and has damage to the value of 1000l. and therefore he brings suit, &c.

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Whereupon the said Henry Greene now in the said court puts in his place Thomas Monck his attorney against the said William Cole in the same plea, &c. and the said Henry Greene now defendant by his said attorney defends the wrong and injury when, &c. and prays leave to imparl thereto in the plea aforesaid to the next hustings of common pleas of London to be holden in the Guildhall of the said city according to the custom of the said city, &c., and it is granted to him, &c.

Defendant im-
pairs.

waste complained of is in cutting trees, and the felling of each tree would of itself be waste, it seems the declaration must shew the number of the trees. 2 Roll. Abr. 832. pl. 1. But where the action is brought for waste in trees, where the cutting of each particular tree would not of itself be waste, but the quantity cut makes it so, the declaration must say *so many loads*. Ibid. pl. 2. So if waste is assigned in houses, the declaration must shew the particular defects.

(4) The declaration must state to be "to the disinheriting" of the plaintiff. Co. Litt. 285. a; but if husband and wife, seised in fee in right of the wife, bring waste, it must be laid to be "to the disinheriting of the wife," for it is *her* inheritance that is damaged by the waste; and if it is alleged to be to the disinheriting of *husband and wife*, the writ shall abate. 2 Roll. Abr. 832. pl. 3.

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COLB.

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Further impar-
lance.

The like.

The like.

and the same day is given by the court here to the said *William Cole* in the said plea here, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the city of *London* according to the custom of the said city, on *Monday* next after the feast of *St. Tiburcius* and *Valerianus* in the 19th year of the reign of our said lord *Charles* the 2d, now king of *England*, &c. come and appear as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke*, &c. and thereupon the said *Henry Greene* by his said attorney now demands further leave to imparl thereto in the plea aforesaid to the next hustings of common pleas of *London*, to be holden in the Guildhall of the said city according to the custom of the said city, &c. and it is granted to him, &c. and the same day is given by the court here to the said *William Cole* in the plea aforesaid here, &c. At which said next hustings of common pleas of *London* holden in the Guildhall of the said city, on *Monday* next after the feast of the apostles *Philip* and *Jacob* in the said 19th year of the reign of our said lord *Charles* the 2d, now king of *England*, &c. come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, &c., and thereupon the said *Henry* by his said attorney now prays further leave to imparl thereto in the plea aforesaid to the next hustings of common pleas of *London* to be holden here in the Guildhall of the said city, according to the custom of the said city, &c., and the same day is given by the court here to the said *William Cole* in the plea aforesaid here, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the city of *London* according to the custom of the said city, on *Monday* next before the feast of *St. Barnabas* the apostle in the said 19th year of the reign of our said lord *Charles* the 2d, now king of *England*, &c. come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and thereupon the said *Henry Greene* by his said attorney now prays further leave to imparl thereto in the plea aforesaid to the next hustings of common pleas of *London* to be holden in the Guildhall

Guildhall of the said city according to the custom of the said city, &c. and it is granted to him, &c. and the same day is given by the said court to the said *William Cole* to be here, &c. at which day, to wit, at the hustings of common pleas of *London*, holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast of the apostles *Peter* and *Paul* in the said 19th year of the reign of our said lord *Charles* the second now king of *England*, &c. come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and thereupon the said *Henry* by his said attorney now prays further leave to imparl thereto in the plea aforesaid to the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, &c. and it is granted him, &c. and the same day is given by the said court to the said *William Cole* to be here, &c. at which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the city of *London* according to the custom of the said city on *Monday* next before the feast of *St. Benedict* the abbot in the said 19th year of the reign of our said lord *Charles* the second now king of *England*, &c. come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and thereupon the said *Henry Greene* by the said *Thomas Moncke* his attorney comes here and defends the wrong and injury when &c. and says that the said plaintiff ought not to have or maintain his said action against him, because he says that he the said defendant, in the parish mentioned in the writ and declaration, did not make any waste (5), sale and destruction, in manner and form as the

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The like.

Plea.
*Nullum facit
wastum.*

(5) This is the general issue in waste. Co. Ent. 700. a. 708. a. 2 Lutw. 1545. And it should seem that the plea in the principal case ought to have concluded to the country, and not with a verification. The plea of *nil waste* admits nothing, but puts the whole declaration

in issue, and therefore the plaintiff must prove his title as laid in the declaration and also the kind of waste stated in it; so that if the waste alleged in the declaration be in *cutting* trees, and the jury find that the defendant *stubb'd* them, it will be a variance. 2 Lutw. 1547.

S f 4.

Leigh

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the said plaintiff by his said writ and declaration has above supposed; and this he is ready to verify; wherefore he prays judgment if the said *William* ought to have his said action against him, &c.

Whereupon a day is given by the said court here, as well to the said *William Cole*, as to the said *Henry Greene*, in the plea aforesaid to be here in court at the next hustings of common pleas of *London*, to be holden in the Guildhall of the said city according to the custom of the said city. At which said hustings of common pleas of *London*, holden in the Guildhall of the said city, according to the custom of the said city, on *Monday* next before the feast of *St. James* the apostle in the said 19th year of the reign of our said lord *Charles* the second now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney; and thereupon at the

Leigh v. Leigh Upon this plea the defendant may give in evidence any thing that proves it to be no waste, as that it happened by tempest, lightning, enemies, or the like. Co. Litt. 283. a., or that the lessor himself committed the waste. 5 H. 4. 2. b. But it is no plea, where the defendant has matter of justification, or excuse; therefore where the defendant cut timber for repairs, and used it accordingly, or for necessary bates, such as for fuel, cartbote, hedgebote, or plowbote, &c., he must plead these matters specially, and cannot give them in evidence on the general issue of *nil waste*. Co. Litt. 283. a. Co. Ent. 703. a. Winch. Ent. 1142—1146. 1169 1182. 2 Lutw. 1546. *Leigh v. Leigh* But it is not enough to say that the defendant took timber, &c. for repairs, without adding likewise that he *used*, or at least *keeps it* for repairs; for though he might at first have taken it for that purpose, yet perhaps he afterwards sold it. 3 Lev. 323. *Danby v.*

Hodgson; or the defendant may plead *nil waste* to part, and a justification to the rest. So if the lease to the defendant was without impeachment of waste. 2 Roll. Abr. 835. pl. 13, 14. Co. Ent. 694 a. b. S. C. or if the trees are excepted out of the lease. 8 East, 190. *Goodright v. Vivian*. See 1 Saund. 322. a. note (5); or if the defendant has repaired before the action, for the jury must view the place wasted, 5 Rep. 119. b. *Whelpdale's case*. 2 Inst. 306, 307.; or if the plaintiff gave the defendant leave to cut the trees; or if the premises were in so ruinous a state at the commencement of the lease that the defendant could not repair them. Moor. 54. *Ward v. Dettenham*. Winch. Ent. 1159. these are matters of justification and excuse, which must be pleaded specially, and cannot be given in evidence on the general issue of *nil waste*. But if the tenant repairs *after* the action brought, he cannot plead it in bar of the action. 2 Inst. 307.

same

same court so as aforesaid holden, the said *William* says that he, by any thing before alleged, ought not to be barred from having his said action, because he says that the said *Henry*, in the said parish of *St. Giles* without *Cripplegate* *London*, did make waste, sale, and destruction as the said *William* above complains against him, and this he prays may be inquired of by the country, &c. and the said *Henry* likewise, &c. Whereupon a further day is given by the said court here to the said parties in the plea aforesaid to be here in court at the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city. At which said next hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast of *St. Michael* the Archangel in the said 19th year of the reign of our said lord *Charles* the second now king of *England*, come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney; as the said *Henry Greene* by the said *Thomas Mencke* his attorney, and thereupon at the same court so as aforesaid holden according to the custom of the said city, the beadle of the ward of *Cripplegate* without, the beadle of the ward of *Aldersgate*, the beadle of the ward of *Faringdon* without, and the beadle of the ward of *Bishopsgate*, being the four wards next adjoining to the said houses, are commanded by the said court here, that each of them the said beadles should separately return and summon six good and lawful men of each of the said wards to be here in court at the next hustings of common pleas of *London*, to be holden in the Guildhall of the said city according to the custom of the said city, &c. and who neither, &c. to recognise, &c. and to try the said issue joined between the said parties in the plea aforesaid according to the custom of the said city, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city, according to the custom of the said city, on *Monday* next before the feast of *St. Luke*, the Evangelist in the 19th year of the reign of our said lord *Charles* the second now king of *England*, &c. come and appear here in court, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene*

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COLE.

Replication that
defendant did
commit waste,
and issue.

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Precept to the
beadles to sum-
mon a jury.

Greene

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Greene by the said *Thomas Moncke* his attorney, and thereupon at the same hustings each of the said beadles of the said four wards returns and certifies to the said court the names of six good and lawful men of every ward of the said wards by them separately summoned, to be here at this day, and who neither, &c. to recognise, &c. to try the issue aforesaid joined between the parties aforesaid in the plea aforesaid; to wit, *Edward Bono*, beadle of the said ward of *Cripplegate* without, returns and certifies to the said court the names of W. E., J. J., T. W., D. W., G. H. and J. M.; *Edward Bedford*, beadle of the said ward of *Aldersgate*, returns and certifies to the said court the names of J. M., G. T., R. P., T. C., S. W., and E. C.; *Samuel Jackson*, beadle of the said ward of *Faringdon* without, returns and certifies to the said court the names of R. B., T. S., R. D., H. T., M. M. and J. W.; and *Henry Coleman*, beadle of the said ward of *Bishopsgate*, returns and certifies to the said court the names of R. S., T. F., T. A., T. L., J. A. and T. M. And because none of the said jury come, therefore the jury is by the said court here put in respite here until the next hustings of common pleas of *London* to be holden in the Guildhall of the said city, and the same day is given to the parties aforesaid in the plea aforesaid to be here, &c. at which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast of *All Saints* in the said 19th year of the reign of our said lord *Charles* the second now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry* by the said *Thomas Moncke* his attorney; and thereupon at the said last mentioned hustings at the prayer of the said *William Cole* made to the court by his said attorney, the sheriffs of *London* are commanded by the said court here according to the custom of the said city, that they distrain the said 24 good and lawful men of the said before-named wards by their lands and chattels, &c. so that they be at the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, &c. to make a jury, &c. to try the said issue as aforesaid joined between the said parties

parties in the plea aforesaid, &c. so that the said jury may not remain to be taken for default of jurors, and let the said jury in the mean time have a view of the said houses wasted, and that the said sheriffs have then here this precept, &c. and the same day is given by the court here to the parties aforesaid in said plea to be here, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next after the feast of *St. Leonard* the abbot in the said 19th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and the now sheriffs of *London*, that is to say, *Sir Thomas Davyes* knt. and *Sir Dennis Gauden* knt., now certify and return to the court here upon the said last precept, that they by virtue of the said precept did distrain the said 24 good and lawful men by all their lands and chattels, so that they should be here at this hustings to make a jury, &c. to try, &c. as they were above commanded, &c. and that each of the said 24 good and lawful men by himself is mainprised by *Thomas Twels* and *Richard Serjeant*; and return the issues of each of the said jurors by himself to 10s.: whereupon at the prayer of the said *William Cole* to the said court now here made by the said *Robert Rawlins* his said attorney, the said 24 good and lawful men of the said city, being then here solemnly called, 12 of them, to wit, J. J., S. W., D. W., G. T., R. P., T. C., S. W., E. C., R. D., H. T., J. W., and R. S., likewise come and appear here, who being then and there chosen, tried and sworn, to speak the truth of the premises, say upon their oath that the said *Henry Greene* did make waste, sale and destruction in the houses of the said messuage, that is to say, by prostrating a brew-house parcel of the said messuage to the value of 100l.; and also by pulling down, pulling off, and carrying away four ale-tuns fixed to the said brew-house, each of them of the price of 4l.; a copper of brass covered with lead likewise fixed to the said brew-house, of the price of 64l. a mash-tun likewise fixed to the said brew-house, of the price of 10l.; and six brewing vessels called coolers made of timber likewise fixed to the brew-house, each of them of the price of 33s. 4d.

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Verdict for
plaintiff as to
part, and for de-
fendant as to
the residue.

in

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COLE.

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Motion that
judgment should
be arrested and
a new trial
granted.

in manner and form as the said *William Cole* has by his said declaration supposed; and as to the residue of the said waste above supposed to be done, the jurors aforesaid upon their oath aforesaid further say, that the said *Henry Greene* made no waste, sale, or destruction therein as the said *Henry* has above thereof in pleading alleged; and they assess the costs and charges of the said *William Cole* by him about his suit in this behalf expended to 12d. Whereupon at the hustings last aforesaid, because the court here would advise what judgment to give of and upon the premises before they give their judgment, a day is given by the said court to the said parties to the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, to hear their judgment thereon, for that the court here is thereof not yet advised, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the city of *London* according to the custom of the said city, on *Monday* next after the feast of *St. Edward* the king in the said 19th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and at the hustings last aforesaid the said *William Cole* by his said attorney prays judgment against the said *Henry Greene* in and upon the said verdict by the jurors aforesaid in form aforesaid given according to the custom of the said city; whereupon at the said hustings last aforesaid the said *Henry Greene* by his said attorney, prays that judgment against the said *Henry Greene*, in and upon the said verdict by the jurors in form aforesaid given, shall be arrested on account of the insufficiency of the said verdict, and that the said issue shall be heard anew by other jurors impanelled anew. Whereupon at the hustings last aforesaid, because the court here will further advise what judgment to give upon the premises before they give their judgment thereon, a day is given by the said court to the said parties to the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, to hear their judgment thereon, for that the court here

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COLE.

is thereof not yet advised, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast of *St. Lucy* the virgin in the said 19th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by *Thomas Moncke* his attorney, and at the hustings last aforesaid the said *William Cole* by his said attorney prays judgment against the said *Henry Greene* in and upon the said verdict by the jurors aforesaid in form aforesaid given according to the custom of the said city : whereupon at the hustings last aforesaid, because the court here will further advise what judgment to give upon the premises before they give their judgment thereon, a day is given by the said court to the parties aforesaid to the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, to hear their judgment thereupon, for that the court here is thereof not yet advised, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next after the feast of *St. Wolstan* the bishop in the said 19th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and at the said hustings last aforesaid the said *William Cole* by his said attorney prays judgment against the said *Henry Greene* in and upon the said verdict by the jurors aforesaid in form aforesaid given according to the custom of the said city, &c. Whereupon at the hustings last aforesaid, because the court here will further advise what judgment to give upon the premises before they give their judgment thereon, a day is given by the said court to the said parties to the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, to hear their judgment thereon, for that the court here is thereof not yet advised, &c. At which day, to wit, at the hustings of common pleas of *London*

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COLE.

Verdict set aside
and a new trial
granted.

London holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next after the feast of *St. Valentine* bishop and martyr in the 20th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moneke* his attorney, and at the hustings last aforesaid the said *William Cole* by his said attorney prays judgment against the said *Henry Greene* in and upon the said verdict by the jurors aforesaid in form aforesaid given according to the custom of the said city; whereupon at the hustings last aforesaid, because it appears to this court that the said verdict in this behalf given ought to be quashed as bad and erroneous, and that a new trial of the said issue ought to be had between the said parties, therefore the said verdict is quashed by the judgment of the said court, and it is granted by the said court that there be a new return of the beaules, and a new precept of *disfringas juratores* to try the said issue anew, and a day is given by the said court to the said parties to the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast of *St. Perpetua* and *Felicitas*, in the said 20th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, whereupon at the hustings last aforesaid a further day is given by the said court to the said parties, until the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next after the feast of the annunciation of the blessed virgin *Mary* in the said 20th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert*

Rawlins his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, whereupon at the hustings last aforefaid at the prayer of the said *Henry Greene* it is commanded to the beadles of four wards of the said city, to wit, to the beadle of the ward of *Cripplegate Without*, the beadle of the ward of *Aldersgate*, the beadle of the ward of *Basishaw*, and the beadle of the ward of *Coleman-street*, that every of them separately should return and summon six good and lawful men of each ward of the said wards according to the custom of the said city, to be here in court at the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, &c. and who neither, &c. to recognize, &c. and to try the said issue joined between the said parties in the plea aforefaid according to the custom of the said city, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast of *St. Tiburcius* and *Valerian* in the said 20th year of the reign of our said lord *Charles* the 2d now king of *England*, &c, come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and thereupon at the hustings last aforefaid each of the said four beadles of the said four last-mentioned wards of the said city of *London*; to wit, *Edward Bono*, beadle of the ward of *Cripplegate*, *Edward Bedford*, beadle of the ward of *Aldersgate*, *George Starley*, beadle of the ward of *Basishaw*, and *Humphrey Windsor*, beadle of the ward of *Coleman Street*, according to the custom of the said city, return and certify to the said court the names of six good and lawful men of each of the said wards by them separately summoned to be here at the present hustings, and who neither, &c. to recognise, &c. and to try the said issue joined between the said parties in the plea aforefaid according to the custom of the said city; to wit, *Edward Bono*, beadle of the said ward of *Cripplegate*, returns and certifies to the said court the names of *J. C.*, *J. L.*, *W. C.*, *C. B.*, *R. K.*, and *G. H.*; *Edward Bedford*, beadle of the said ward of *Aldersgate*, returns and certifies to the said court the names of *J. M.*, *T. C.*, *J. A.*, *J. W.*, *R. G.*, and *J. R.*;

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COLE.**

Another pre-
cept to the bea-
dles of four
wards to sum-
mon a jury.

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COLE.

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Distingas juratores.

J. R. ; *George Starkey*, beadle of the said ward of *Basilward*, returns and certifies to the said court the names of E. H., J. L., J. W., T. C., E. C., and J. C.; and *Humphrey Windsor*, beadle of the said ward of *Coleman Street*, returns and certifies to the said court the names of H. C., M. C., D. W., J. E., T. M., and W. L.; and because none of the said jurors come, therefore at the said hustings last aforesaid the sheriffs of *London* are commanded by the said court here according to the custom of the city that they distrain the said 24 good and lawful men of the said last before-mentioned wards by their lands and chattels, so that they be at the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city to make a jury, &c. to try the issue as aforesaid joined between the said parties in the plea aforesaid, so that the said jury may not remain to be taken for want of jurors, and let the said jury in the mean time have a view of the said place wasted, and that the said sheriffs last named may have then here this precept, &c. and the same day is given by the court here to the said parties in the said plea to be here, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast of *St. Petronille* the virgin in the said 20th year of the reign of our lord *Charles* the 2d now king of *England*, &c. come here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and the sheriffs of *London*, to wit, the said *Sir Thomas Davyes* *knt.* and *Dennis Gauden* *knt.* now certify and return to the court here upon the said last mentioned precept, that they by virtue of the said precept did distrain the said 24 good and lawful men by all their lands and chattels, so that they should be here in court at the present hustings to make a jury to try, &c. as they were above commanded, and that every of the said 24 good and lawful men by himself is mainprised by *John Doe* and *Richard Roe*, and return issues of each of the said jurors by himself to 10s., and that the said jury after the receipt of the said precept and before the return thereof, had
a view

a view of the houses within specified with the appurtenances, as it was above commanded; whereupon at the prayer of the said *William Cole* now made to the court here by the said *Robert Rawlins* his attorney, the said 24 good and lawful men of the said city being now here solemnly called, 12 of them, to wit, J. C., J. L., C. B., J. M., J. A., R. G., E. H., J. L., J. W., H. C., D. W., and J. E., likewise come and appear here, who being chosen, tried, and sworn to speak the truth of the premises, say upon their oath that the said *Henry* did not make any waste, sale, and destruction in manner and form as the said *William Cole* by his said writ and declaration above supposes; whereupon at the hustings last aforesaid, because the court here will advise what judgment to give upon the premises before they give judgment thereon, a day is given by the said court to the said parties to the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next after the feast of *St. Barnabas* the apostle in the said 20th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Monke* his attorney, and at the hustings last aforesaid, the said *Henry Greene* by his said attorney prays judgment against the said *William Cole* in and upon the verdict last aforesaid by the jury aforesaid in form aforesaid given according to the custom of the said city, &c. Whereupon at the hustings last aforesaid, because the court here will advise what judgment to give of and upon the premises before they give any judgment thereon, a day is given by the said court to the said parties until the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, to hear their judgment thereon, for that the court here is thereof not yet advised, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast

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COLE.

Verdict for defendant that he did not make any waste.

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Curia advisare vult.

Curia advisare vult.

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*Cu ia ulterius
adversare vult.*

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of St. *John* the baptist in the said 20th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and at the said hustings last aforesaid the said *Henry Greene* by his said attorney prays judgment against the said *William Cole* in and upon the verdict last aforesaid by the jurors aforesaid in form aforesaid given according to the custom of the said city, &c. Whereupon at the hustings last aforesaid, because the court here will further advise what judgment to give upon the premises before they give judgment thereon, a day is given by the said court to the said parties until the next hustings of common pleas of *London* to be holden in the Guildhall of the said city according to the custom of the said city, to hear their judgment thereon, because the court here is thereof not yet advised, &c. At which day, to wit, at the hustings of common pleas of *London* holden in the Guildhall of the said city according to the custom of the said city, on *Monday* next before the feast of St. *Benedict* the abbot in the said 20th year of the reign of our said lord *Charles* the 2d now king of *England*, &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney; whereupon at the hustings last aforesaid the said *Henry Greene* by his said attorney prays judgment against the said *William Cole* in and upon the verdict last aforesaid by the said jury in form aforesaid given according to the custom of the said city; whereupon at the hustings last aforesaid it is considered by the said court, that the said *William Cole* esq. take nothing by his said writ, but be in mercy for his false claim thereof, and the said *Henry Greene* go quit thereof without day, &c.

Whereupon then and there, to wit, on the said *Tuesday* the 16th day of *February* in the 21st year of the reign of our said lord *Charles* the second now king of *England*, &c. a day is given by the said justices to the said *William Cole* to assign errors of and in the record aforesaid until *Tuesday* the 23d day of *February* in the year last aforesaid, and the same day is
given

given then and there to the said parties here, &c. At which said *Tuesday* the 23d day of *February* in the 21st year of the reign of our said lord the now king comes before the justices here, to wit, at the Guildhall of the said city, the said *William Cole* in his proper person, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that it did appear to the court here that the said verdict first given ought to be quashed as bad and erroneous, and that a new trial of the said issue should be had between the said parties, and therefore the said verdict was quashed by the judgment of the said court, and it was granted by the said court that there should be a new return by the beadles, and a new precept of *distringas juratores* to try the said issue anew, whereas in truth the said verdict was not bad or erroneous, neither ought the said verdict to have been quashed, nor any new trial had in the said cause, and therefore in that there is manifest error; there is also error in this, to wit, that judgment was given by the said court on the said first verdict against the said *Henry Greene*, whereas judgment ought to have been given for the said *William Cole* on the first verdict, and therefore in that there is manifest error: and the said *William Cole* prays that the said justices here may proceed to examine as well the record and proceedings aforesaid as the errors aforesaid, and that the judgment aforesaid for the errors aforesaid, and others in the record aforesaid, may be reversed, annulled, and altogether held for nothing, and that judgment may be given by the justices here for the said *William Cole* on the said first verdict, and that the said *Henry Greene* may rejoin to the said errors, &c.

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Assignment of
error by the
plaintiff.

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And the said *Henry Greene* in his proper person then and there likewise appears, and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he likewise prays that the said justices assigned by the commission of our said lord the king to examine and correct errors, if any there be, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error. And thereupon a day is then and there given by the said justices here to the said parties to be here before the said justices at Guildhall aforesaid

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*Curia advisare
vult.*

*Curia advisare
vult.*

Ulterius advisare.

Ulterius advisare.

saïd, on *Friday* the 30th day of *April* next coming to hear their judgment thereon, for that the saïd justices here are thereof not yet advised, &c. At which saïd *Friday* the 30th day of *April* in the 21st year of the reign of our saïd lord the now king, come here, to wit, at the Guildhall aforesaid, before the saïd justices, as well the saïd *William Cole* by his saïd attorney, as the saïd *Henry Greene* by his saïd attorney, and thereupon, because the saïd justices here will further advise what judgment to give upon the premises before they give judgment thereon, a day is given by the saïd justices here to the parties aforesaid to be here before the saïd justices at the Guildhall aforesaid, on *Friday* the 14th day of *May* next coming to hear their judgment thereon, for that the saïd justices here are thereof not yet advised, &c. At which saïd *Friday* the 14th day of *May* in the saïd 21st year of the reign of our saïd lord *Charles* the second now king of *England*, &c. come here, to wit, at the Guildhall aforesaid, before the saïd justices, as well the saïd *William Cole* by his saïd attorney, as the saïd *Henry Greene* by his saïd attorney, and thereupon, because the saïd justices will further advise what judgment to give upon the premises before they give their judgment thereon, a day is given by the saïd justices here to the saïd parties to be here before the saïd justices at the Guildhall aforesaid, on *Thursday* the 27th day of *May* next following, to hear their judgment thereon, for that the saïd justices here are thereof not yet advised, &c. At which saïd *Thursday* the 27th day of *May* in the saïd 21st year of the reign of our saïd lord *Charles* the second now king of *England*, &c. come here, to wit, at the Guildhall aforesaid before the saïd justices, as well the saïd *William Cole* by his saïd attorney, as the saïd *Henry Greene* by his saïd attorney, and thereupon, because the saïd justices will further advise what judgment to give upon the premises before they give judgment thereon, a further day is given by the justices to the saïd parties to be here before the saïd justices here at the Guildhall aforesaid, on *Monday* the 14th day of *June* next coming to hear their judgment thereon, for that the saïd justices here are thereof not yet advised, &c. At which saïd *Monday* the 14th day of

June

June, in the said 21st year of the reign of our said lord *Charles* the second now king of *England*, &c. come here, to wit, at the Guildhall aforesaid, before the said justices, as well the said *William Cole* by his said attorney, as the said *Henry Greene* by his said attorney, and thereupon, because the said justices (the like continuances by *curia advisare vult* to five other days). At which said *Wednesday* the first day of *December* in the said 21st year of the reign of our said lord *Charles* the second now king of *England*, &c. come here, to wit, at the Guildhall aforesaid, before the said justices, as well the said *William Cole* by his said attorney, as the said *Henry Greene* by his said attorney, and thereupon the premises being seen, and by the justices here more fully understood, and mature deliberation being thereupon had, it seems to the said justices here that the said first verdict was not, nor is, bad or erroneous, nor ought the said verdict to have been quashed, or any new trial had in the said cause, but judgment ought to have been given upon that verdict for the said *William* against the said *Henry*: therefore, no regard being had to the said 12d. assessed for costs and charges, for that costs and charges are not allowed in such case, and because the said *William* freely here in court remits those costs and charges to the said *Henry*, it is considered by the court here that the whole proceedings had and made in the said cause for the said second trial after the said first verdict, and also the said second verdict and the judgment given as aforesaid thereon, be reversed, annulled, and altogether held for nothing, and that the said *William* recover his seisin (6) against the said *Henry* of the said places wasted by the

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Judgment re-
versed.

(6) If the jury find that the defendant has committed only *part* of the waste stated in the declaration, the verdict must specify the particular waste so found, and as to the residue that the defendant made no waste; and judgment must be entered up for the plaintiff as to the part found for him, and for the defendant as to the residue. If judg-

ment is given against the defendant in an action of waste in the *tenet*, it must be for the place wasted, and also for damages; but if it be in the *tenuit*, it is for damages only.

If the jury find a verdict for the plaintiff in an action of waste, and give damages under 40d., it seems that judgment shall be given for the defendant.

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the view of the jury of the said first inquisition, and his damages aforesaid on occasion of the said waste above found, to be trebled according to the form of the statute, &c. which said treble damages amount in the whole to 600l., and the said *Henry* thereof in mercy, &c. and likewise the said *William Cole* in mercy for his false claim against the said *Henry* of the residue of the said waste whereof the said *Henry* was acquitted by the said jury first impanelled, and of the said residue of the said waste that the said *Henry* go thereof without day, &c.

Assignment of
errors in the
House of Lords.

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Afterwards, that is to say, on *Thursday* the 8th day of *December* in the 22d year of the reign of our said lord *Charles* the second now king of *England*, &c. before our said lord the king, and the peers of this realm of *England*, in this present parliament at *Westminster* in the county of *Middlesex* assembled, comes the said *Henry Greene* in his proper person, and says that in the reversal of the said judgment given in the court of hustings of *London*, and also in giving judgment thereupon for the said *William Cole* against the said *Henry Greene* before the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, and Sir *William Morton*, the commissioners aforesaid, by virtue of the said commission, there is manifest error in this, to wit, that it appears by the record that the issue in form aforesaid joined between the said *William Cole* and him the said *Henry Greene* was first tried by jurors returned from the four wards following, to wit, the ward of *Cripplegate* without, the ward of *Aldersgate*, the ward of

Bro. *Waste* 23. Co. Litt. 54. a. 2 Inst. 305. 2 Roll. Ab. 824. (L.) pl. 1, 2, 4. Cro. Car. 414. *King v Fitch*. Finch Law. 29. 2 Bos. & Pull. 86. *Keepers of Harrow School v. Alderton*; and if in such case judgment were given for the plaintiff, it would be erroneous. But yet it has been held, that cutting trees to the value of 3s & 4d. is waste; and that several particular wastes, each of small value, may be united so as to make a large sum sufficient to maintain

the action; as where damage is found in one house to the value of 20d., in another to the value of 22d., and in a third to the value of 12d.; though these damages taken separately will not be sufficient to support the action, yet by adding them together and making one sum of the whole, the sum is sufficient to entitle the plaintiff to his judgment. Co. Litt. 54. a. 2 Roll. Ab. 824. (L.) pl. 3. 5. Bro. *Waste* 70.

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Faringdon without, and the ward of *Bishopsgate*; and it likewise appears by the record that by the ancient custom of the said city, the trial in such case ought to be by a jury returned from the four next wards next adjoining to the places wasted or supposed to be wasted, or otherwise such trial is not valid or sufficient according to the said custom. And the said *Henry Greene* in fact says, that the said four wards of *Cripplegate* without, *Aldersgate*, *Faringdon* without, and *Bishopsgate*, were not the four wards next adjoining to the said houses above supposed to be wasted, but the said four wards of *Cripplegate* without, *Aldersgate*, *Basilbarrow*, and *Coleman Street* were the four wards next adjoining to the said houses above supposed to be wasted, in which case the said trial had by the jury from the said wards of *Cripplegate* without, *Aldersgate*, *Faringdon* without, and *Bishopsgate*, not being according to the custom of the said city, is void and of no effect in law, and no judgment ought to have been given thereon for the said *William Cole* against the said *Henry Greene*, and therefore in that there is manifest error; and this the said *Henry Greene* is ready to verify, wherefore he prays judgment, and that the said judgment given by the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, and Sir *William Morton* the commissioners aforesaid for the said *William Cole* against the said *Henry Greene* may be reversed, annulled, and altogether held for nothing, and that he the said *Henry Greene* may be restored to all things which he has lost by occasion of the said judgment, &c.

Greene versus Cole.

ERROR in parliament brought by *Henry Greene* against *William Cole*, a barrister of *Gray's-Inn*, on a judgment given by special commissioners in *London* to examine and correct a judgment given in the hustings before the mayor and sheriff, between the said *Cole* plaintiff and the said *Greene* de-

if the jury do not find any *sale*, it is not material, if they find particular *wastes*. If the jury give costs of suit, there being none recoverable in the action, yet judgment may be entered for the plaintiff, *nullo habito reji cū*, to the costs.

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S. C. 1 Lev.

309.

See 1 Mod.

94. 95

In waste stating that the defendant did make waste, *sale* and destruction,

GREENE v. COLE. fendant, in an action of waste (7); in which the plaintiff *Cole* had declared, that one *Hilliard* was seised in fee of a messuage with the appurtenances, (which in truth was a great brew-house,) in the parish of St. *Giles* without *Cripplegate*, *London*, and, being so seised, demised the said messuage with the appurtenances to the defendant *Greene*, to have for 51 years; by force

(7) This action can only be brought by him who has *the immediate* reversion, or remainder in *fee*, or in *tail*, to the *disinheritance* of whom the waste is always alleged to have been committed. Co. Litt. 53. a. and therefore if a lease be made to A. for life, or years, remainder to B. for life, and A. commit waste, the action cannot be brought by him in the remainder, or reversion in fee, or in tail, so long as the estate of B. continues. Co. Litt. 54. a. All. 81. *Udal v. Udal*. 2 Roll. Abr. 829. Cro. Jac. 188. *Bray v. Tracy*: but if B. should afterwards die, or surrender his estate, the reversioner or remainder-man may bring an action against A. for the waste so done by him; for by the death or surrender of B. the impediment is removed. Moor. 387. 5 Rep. 76. b. *Paget's case*. Sir W. Jones, 51. *Bray v. Tracy*. So if a lease for life be made, remainder *for years*, the reversioner or remainder-man may bring the action, notwithstanding the mesne remainder. Co. Litt. 54. a. 2 Inst. 301. It is held that tenant in tail after possibility cannot have the action, for in effect he is only tenant for life. 2 Roll. Abr. 825. pl. 5. Co. Litt. 53. b. Nor can any person maintain this action, unless he had an estate of inheritance in him *at the time when the waste was committed*; and therefore it does not lie

by an heir for waste done in the time of his ancestor. 2 Inst. 305. Nor by the grantee of a reversion for waste committed before the grant to him.

With respect to the person *against* whom this action may be brought, it seems clear that at common law it only lay against tenant by the curtesy, tenant in dower, or guardian; for as these estates were created by law, it took care to prevent any waste being committed by them, by giving the reversioner in fee an action of waste to punish them for an act so injurious to the inheritance; but if tenant for life or years committed waste, the law gave the reversioner no action of waste, because as these estates were created by grant, the grantors might have secured themselves from waste, by inserting in the grant a special provision against it. 2 Inst. 300. But now by the statute of *Geor. 4*. (6 Edw. 1. c. 5.) this action is given against lessee for life, or years, or tenant *pur autre vie* 2 Inst. 301.; or against the assignee of tenant for life or years, for waste done after the assignment. Cro. Eliz. 683. *Sanders v. Norwood*. But it does not lie against an executor for waste committed by his testator, it being a tort which dies with the person. 2 Inst. 302. 2 Roll. Abr. 828. pl. 7.

But this action is now very seldom brought,

force of which demise he entered, and the said *Hilliard*, being seised of the reversion, afterwards by his will in writing devised it to the plaintiff *Cole* and died, whereby the plaintiff was seised of the reversion : and being so seised, and the defendant *Greene* being possessed of the said messuage with the appurtenances for the term aforesaid, the said *Greene* “ did make waste, sale

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and

brought, and has given way to a much more expeditions and easy remedy by an *action on the case in the nature of waste*. The plaintiff derives the same benefit from it, as from an action of waste in the *tenuit*, where the term is expired, and he has got possession of his estate, and consequently can only recover damages for the waste ; and though the plaintiff cannot in an action on the case recover the place wasted, where the tenant is still in possession, as he may do in an action of waste in the *tenet*, yet this latter action was found by experience to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff obtained little or no advantage from it ; and therefore where the demise was by deed, care was taken to give the lessor a power of re-entry, in case the lessee committed any waste or destruction ; and an action on the case was then found to be much better adapted for the recovery of mere damages than an action of waste in the *tenuit*. It has also this further advantage over an action of waste, that it may be brought by him in the reversion or remainder for *life* or *years*, as well as in fee, or in tail ; and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste. However, this action on the case prevailed at first with some difficulty. Thus, where a remainder-man

in fee of a copyhold estate brought an action on the case in the nature of waste against tenant for life for waste done in the dwelling-house, the defendant demurred generally to the declaration, and in support of the demurrer it was objected, first, that an *action on the case* did not lie ; for Lord *Coke* on the statute of *Glocester* says, that at common law the reversioner had not any remedy for waste committed by the termor, it being his own folly that he had not taken security against it by covenant ; and secondly, that the jury could not tell what damages to give, for it was uncertain how long the tenant for life would live, and the house might be repaired by him in his life-time. And of that opinion were *Windham* and *Charlton* justices strongly ; but *Pemberton* C. J. and *Levinz* were of a contrary opinion. And, as to the first objection, they said that Lord *Coke* was to be understood according to the subject-matter of which he is speaking, namely, that there was no remedy by an action of *waste*. And *Pemberton* said that a lessor might without doubt at this day waive his remedy by action of waste, and bring an action on the case against his lessee for waste ; and cited Cro. Eliz. 461. *Jeremy v. Lowgar* ; where husband, seised in fee in right of his wife, made a lease for years, lessee burnt the house, the husband brought an action on the case

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and destruction in the houses of the said messuage, that is to say, by prostrating a brewhouse parcel of the said messuage of the price of 1000l. and taking away and selling the timber and roof thereof;" and so assigned several other wastes to the disinheriting of the plaintiff, "and against the form of the provision in such case made and provided," &c. To which the

case, and by the two judges then in court, it was held, that it lay, notwithstanding the objection that waste did not lie in such case at the common law, because he might have secured himself by covenant. And as to the second objection, *Pemberton* and *Levinz* said it would be unreasonable to compel him to wait until the death of tenant for life to see if he would repair, for perhaps in the mean time either the plaintiff or defendant might die, and then the action founded on a tort would die with the person; or the reversioner might wish to dispose of the reversion, which, by reason of the waste committed by the tenant for life, would not sell for so much money as it would do if the house were in proper repair. 3 Lev. 130. *Jefferson v. Jefferson*. 4 Burr. 2141. *Jesser v. Gifford*.

But now it is become the usual action as well for permissive as voluntary waste. And where the lessee even covenants not to do waste, the lessor has his election to bring either an action on the case, or of covenant, against the lessee for waste done by him during the term. As where a lease was made for twenty one years, in which the lessee covenanted to yield up the premises repaired at the end of the term; the lessee during the term committed waste, and at the expiration thereof delivered up the premises to the lessor in a ruinous

condition. Afterwards the lessor brought an action on the case against the tenant for the waste committed by him during the term; and it being objected at the trial that the plaintiff ought to have brought an action of covenant, and not on the case, a verdict was found for the plaintiff subject to that point; but the court of Common Pleas was clearly of opinion, that an action on the case was maintainable as well as covenant; and by *De Grey J C.*, tenant for years commits waste, and delivers up the place wasted to the landlord: had there been no deed of covenant, an action of waste, or case in the nature of waste, would have lain. Because the landlord by the special covenant acquires a new remedy, does he therefore lose his old? 2 Black. Rep. 1111. *Kenlyside v. Thornton*.

In an action on the case in the nature of waste brought by a landlord, whether the immediate lessor, or his heir or assignee, against his tenant, whether lessee or his assignee, it does not appear to be necessary, as in an action of waste, to set out the title either of the plaintiff or the defendant in the declaration; but it seems sufficient to state their relation to each other in a form somewhat similar to this: "That whereas the said (defendant) on, &c. in the year of
" our Lord, &c. and before, and from
" them-

the defendant pleaded *no waste made*, and thereupon issue was joined; "whereupon according to the custom of the said city it is commanded by the said court here to the beadle of the ward of *Cripplegate* without, to the beadle of the ward of *Aldersgate*, to the beadle of the ward of *Faringdon* without, and the beadle of the ward of *Bishopsgate*, being the four wards
next

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"thence until and at the time of committing the grievance in this count mentioned, was and still is possessed of and in a certain, &c., with the appurtenances, lying and being at, &c. in the said county, and during all that time held and occupied the same as tenant thereof to the said (plaintiff) to whom the reversion thereof during all the time aforesaid belonged, under a certain demise theretofore made to the said (defendant) at and under a certain rent therefore payable by the said (defendant) to the said (plaintiff): yet the said (defendant) contriving, &c." But where an estate is given to A. for life, remainder to B. in fee, or in tail, and A. is guilty of waste either voluntary or permissive, it seems necessary to set forth in the declaration the quantity of estate which A. is seised of, though not the quantity of estate which the plaintiff has in the reversion, for that is matter of evidence only; and in that case, the form of the declaration may be somewhat in this way: "That
"whereas the said (defendant) on, &c.
"in the year of our Lord, &c., and
"before, and from thence until and at
"the time of committing the grievance
"in this count mentioned, was and still
"is seised of and in a certain, &c. with
"the appurtenances, lying and being at

"&c. in the said country in his demesne
"as of freehold, the reversion (or remainder) thereof during all the time
"aforesaid belonging to the said (plaintiff): yet, &c." And it seems better not to state the estate which the plaintiff has in the remainder or reversion; for if he does state it, and mistakes it, the variance will be fatal. As where, in an action on the case in the nature of waste, the declaration set forth that the defendant was tenant for life, the remainder thereof during all the time aforesaid belonging to the plaintiff *in tail*, to wit, *to him and the heirs of his body*; but on reading the deed by which the plaintiff and defendant's estates were created, it appeared, that the plaintiff was entitled to the remainder *in tail-male*, and not in tail-general, as stated in the declaration; and it was held by Mr. Baron *Thompson*, before whom the cause was tried, that this was a fatal variance, and the plaintiff was nonsuited. *Hardwicke v. Thompson, Gloucester Summer Assizes, 1799.* And for the same reason if the plaintiff, in an action of waste, declares of an estate to him and his *heirs-male*: and the defendant derives the estate to the plaintiff and his *heirs-female*, it is not good without a traverse of the estate surmised or alleged by the plaintiff; for these different limitations are a substantial variance. *Yelv. 141. Ewer v. Moile.*

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next adjoining to the said houses, that every of the said beadles separately do return and summon six good and lawful men of each ward of the said wards to be here in court at the next hustings, &c. to try the said issue joined between the parties, &c." And at the return of the said precept each of the said beadles returned the names of six jurors, none of whom came, &c.

It seems necessary in an action on the case, as well as in an action of waste, to state in the declaration the nature and kind of waste which is the subject of the action; and the plaintiff will not be permitted to give evidence of a different sort of waste from that which is laid in the declaration. If, for instance, the plaintiff charges the defendant with permissive waste, he cannot give evidence of voluntary waste committed by him; so if the defendant is charged with uncovering the *roof* of a dwelling-house, the plaintiff cannot give in evidence that the defendant removed some *fixtures* from it; just as if the breach assigned in an action of covenant should be, "that the defendant had not used "the demised premises, or any part "thereof, in a good and husband-like "manner; but *on the contrary* thereof "had committed, permitted and suffered to be made, done and committed "in and upon the said demised premises, *waste, spoil and destruction*," the plaintiff will not be permitted to give evidence of the defendant's using the farm in an unhusband-like manner, unless it amounts to *waste*; for though the evidence would have been admissible on the former part of the breach, yet as the plaintiff had in the subsequent part of it narrowed it to waste, spoil and destruction, it is not competent to him

to give evidence of any other particulars which did not come within the meaning of these words 3 Term Rep. 307. *Harris v. Mantle*. It is true that the plaintiff is not bound to prove the whole waste stated, nor is there any necessity for the jury to find the particular circumstances of the waste, as in an action of waste, because there the plaintiff is to have seisin of the place wasted; nor to find a verdict for the defendant for so much of the waste as the plaintiff does not prove, for in this action the plaintiff only goes for damages, and the jury may assess them generally; but yet the plaintiff is bound to set out the nature, quantity, and quality of the waste, that the defendant may be apprised of the charge, and prepared for his defence. If the action on the case be for voluntary waste committed in a house, as taking away the windows, for instance, the plaintiff must state the waste accordingly, in some such way as this, "that "the said (defendant) wrongfully and "unjustly, and without the licence and "against the will of the said (plaintiff) "pulled down, took down, and prostrated, and caused and procured to "be pulled down, &c. divers, to wit, "two (care must be taken that the "number is sufficient) glass windows "and twenty (a sufficient number) "square feet of glass fixed in lead, of "and

&c. whereupon a *disfringas* was awarded against them, returnable at another day; and in the mean time let the said jury view the place wasted, &c. and at the return of the said precept the bradles returned the precept served; and the jury appeared (but it was not returned that they had viewed the place wasted) and thereupon 12 of the said jury being sworn to try the issue "say upon their oath that the said defendant did waste, sale and destruction on the houses of the said messuage, to wit, by prostrating a brewhouse, parcel of the said

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"and belonging to the said messuage,
"and then affixed thereto, and of and
"belonging to the said (plaintiff) as
"landlord of the said messuage, and
"as parcel thereof, and being of the
"value of 10l., and wrongfully and
"unjustly carried away, and caused to
"be carried away the same, and converted and disposed thereof to his
"own use, whereby, &c." If the action be for permissive waste, the declaration is then conceived in some such form as this, "wrongfully and injuriously permitted and suffered the said messuages or dwelling-houses, stables, barns and out-houses, to be prostrate, ruinous, fallen down, and in great decay in the timber, doors, wainscotts, windows, window shutters, floors, tiling, joists, beams, and rafters thereof, for want of needful and necessary repairing thereof," &c. If the action be for waste committed in trees or wood, the manner of assigning the waste may be in this form, "wrongfully, &c. rooted up, pulled up, felled, cut up, prostrated and destroyed divers timber trees, and a large quantity of bushes, to wit, 500 (a sufficient number) oak trees, 500 ash trees, 500 elm trees, and 500 other trees,

"and 50 cart loads of bushes of the said (plaintiff) of the value of 1000l. then growing and being in and upon the said premises, and carried away the same, and converted and disposed thereof to his own use, and wrongfully, &c. lopped, topped and shrouded, and caused and procured to be, &c. divers other maiden trees, to wit, 40 oaks, 40 ashes, 40 elms, and 40 other trees of the said (plaintiff) of the value of 100l., there then standing, growing and being, and took and carried away the wood thereof coming, whereby, &c." If the waste be in destroying the hedges, then the language of the declaration is generally this, "wrongfully and unjustly broke down, pulled down, pulled to pieces, prostrated, spoiled and destroyed the hedges and fences, to wit, 100 perches of the hedges, and 100 perches of the fences of the said (plaintiff) of and belonging to the said premises, and the bushes, thorns and wood thereof coming, to wit, 20 cart loads of bushes, 20 cart loads of thorns, and 20 cart loads of the said (plaintiff) of the value of 20l., took and carried away, and converted and disposed thereof to his own use, &c."

messuage

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messuage of the price of 100l." and in like manner they found several other particular wastes to the value of 200l. in the whole; but they did not find any particular sale; and they assessed costs for the plaintiff to 12d. And because in the beginning the jury said that the defendant "did *make waste, sale and destruction*," but did not afterwards find any particular sale, and also because they assessed costs of suit where none ought to be recovered, after several continuances, "because it appears to the court here that the said verdict given in this cause ought to be quashed, and is bad and erroneous, therefore the said verdict by the judgment of the said court is quashed, whereupon at the prayer of the said *Henry Greene*, the beadles of four wards of the said city are commanded, to wit, the beadle of the said ward of *Cripplegate* without, the beadle of the said ward of *Aldersgate*, the beadle of the ward of *Basilbarn*, and the beadle of the ward of *Coleman-street*, that every of them separately return and summon six good and lawful men of every ward of those wards to try the said issue, &c. and these last four wards were not said in the record to be the four wards next adjoining to the place wasted, though in truth they were so; and the wards of *Cripplegate* without, and *Aldersgate*, were two wards next adjoining, and so it appeared on the record. And on the return of this precept a *disfringas* was awarded returnable at another court, "and in the mean time let the jury have a view of the place wasted:" at which court the beadles returned their precept served, and also returned that the jury had viewed the place wasted, and thereupon the last jury being sworn to try the issue found a general verdict for the defendant, that there was no waste made; upon which the plaintiff *Cole* sued out a special commission of errors in *London* according to the custom directed to several judges; but the defendant, perceiving that *Cole* the plaintiff prosecuted such commission, would not pray his judgment of acquittal on the last verdict, whereupon the plaintiff *Cole* prayed judgment to be given against himself, so that he might proceed to impeach the judgment on the said commission of errors. And the question was if the court ought to give judgment in this case at the prayer of the plaintiff, or not; and upon advice it was ruled that the court ought to give judgment at the prayer of

When the jury have found a verdict for the defendant, judgment may be given for him at the prayer of the plaintiff.

of the plaintiff, for otherwise the plaintiff would be deprived of his remedy by writ of error to redress his grievance by the judgment, admitting it was erroneous; wherefore at the prayer of the plaintiff judgment was given for the defendant, "that the plaintiff take nothing by his writ, but be in mercy for his false claim, and that the said defendant go thereof without day" &c. see Dyer 194. b. for giving judgment at the prayer of the other side. And upon this the plaintiff *Cole* proceeded on the commission of errors, and the judges commissioners sent to the mayor and sheriffs for the record in the hustings, to bring it before them at Guildhall on a day appointed; and thereupon a question was stirred, whether the first verdict, which was quashed as aforesaid, ought to be certified in the record, or ought to be wholly omitted out of it. And afterwards upon advice it was certified, for the verdict was not set aside because the jury found against evidence, or for any undue practice or misconduct of the parties, but only for its insufficiency in point of law, which the court had adjudged on the verdict as it appeared before them on record; and therefore it ought to be certified as parcel of the record, and so it was (8).

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And

(8) But now, when a new trial is granted, no notice whatever is taken in the plea roll of the verdict, but, after the award of the *venire*, the entry is this: "Afterwards the process being continued between the parties aforesaid of the plea aforesaid by the jury being respited between them (or in K. B. before our lord the king at *Westminster*) until fifteen days of *Easter* thence next ensuing, unless the justices, &c." and then follows the verdict returned upon the *poslea*: As if, for instance, in a country cause, the *venire* is returnable in *Trinity* term, and the *disfringas* or *habeas corpora* on the morrow of All-Souls, with the usual

clause of *nisi prius* in it, and a verdict is given at the assizes, which is afterwards set aside and a new trial granted; there is no necessity to continue in the plea-roll the *venire* from *Trinity* to the term preceding the second trial by a *viccomes non misit breve*, but the entry of the *poslea continuato processu*, as it is called, is immediately after the award of the first *venire* returnable in *Trinity* term as before mentioned. And the reason seems to be because the statute of 32 H. 8. c. 30, having cured a discontinuance after verdict, it was no longer material to continue the jury process from term to term down to the issuing of the *disfringas*, or *habeas corpora*.

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And upon this record so certified, divers points were resolved by the judges commissioners, namely, *Moreton*, *Rainford*, *Turner*, *Hale* chief-baron, and *Vaughan* chief-justice of the common bench, who delivered their opinions *seriatim* in *Michaelmas* term, in the 21st of the king that now is: to wit:
1. That the waste was well maintainable in *London*, for it was an action time out of memory; and though the statute of *Gloucester* c. 5. gives treble damages, and in some cases gives them in an action of waste where none was before, yet no jurisdiction is taken away by the statute, and therefore the court that had jurisdiction before the statute to hold plea of waste shall have it now, as well in those cases where an action of waste is given by the statute, as in other cases at common

Gilb. H. C. B. 82. 3d edit. The award of the *disfringas*, or *habeas corpora*, was never entered on the plea-roll, for if the parties had not gone to trial, it would have been necessary to have awarded an *alias* and *pluries disfringas*, or *habeas corpora*, which would have obliged the jury to have come up in terms, and also in such as were not issuable. Ibid 79. And besides, a new *venire* could not be awarded after a *disfringas* or *habeas corpora*, until the statute 7 & 8 W. 3. c. 32. empowered the plaintiff to sue out a new *venire*, and therefore in case the jury appeared at the assizes and gave a verdict, which was afterwards set aside and a new trial granted, if the award of the *disfringas* or *habeas corpora* had been entered on the plea-roll. there could have been no award of a new *venire* as the law stood before that statute; therefore the award of the *disfringas* or *habeas corpora* was never entered on the plea-roll. In the *nisi prius* roll, after the award of the *venire*, a new *placita* is entered, as well

in the common pleas as in the king's bench, of the term in which the cause is to be tried again, if in term, or preceding the second trial, if tried in the vacation. A new *placita* is added in order to satisfy the judge who tries the cause that it has been regularly continued, and that he has therefore an authority to try it. The return of the *jurata* must of course be altered; but it is not necessary that the *nisi prius* record should be re-engrossed, unless the *poslea* has been indorsed upon it, though it must be passed again, and a new *venire* and *disfringas*, or *habeas corpora*, must be sued out. Gilb. K. C. B. 80, 81. Tidd's Prac. K. B. 817, 818. In the *nisi prius* roll in the king's bench a new *placita* is always entered after the award of the *venire*, though the parties go to trial the same term in which issue is joined; but in the common pleas a second *placita* is not entered in the *nisi prius* roll, unless on the death or change of a chief justice, or it be an old record. Gilb H. C. B. 81.

law;

law; see 8 H. 6. 34. (c), that this action does not lie in ancient demesne, because they, on default on the grand distress, cannot make a writ to the sheriff to inquire of the waste as the statute appoints. See 7 H. 6. 35. (d) where in the end of the case it is said that it does not lie in *London*; but Lord Coke in 2 Inst. 299. says that an action of waste lies in *London* by custom (9). 2. That though the view was not returned on the process by which the first jury appeared and were sworn and tried the issue, yet it was good enough, because though the jury ought to have a view, yet it is not necessary for the officer to return it; but the court at the trial ought to examine the matter whether the jury had a view or not, for on the trial six jurors at least ought to have a view, or otherwise the jury should not be taken, 9 H. 6. 65. b.; and in 24 E. 3. 26, a day of continuance was given, because the jury had not a view, and “in the mean time let them have a view, &c.” and in assize a view of the jury is requisite, but it is never returned, for perhaps the sheriff or the officer does not know whether the jurors have had a view or not; for the words of the writ are “and in the mean time let the jury have a view, &c.” and not, “and in the mean time you cause them to have a view;” so that the jury may view the place wasted when the officer is not present, and therefore the officer is not bound to return a view, but it ought to be examined at the trial; and the party may make his challenge to the jury for this cause, if six of them at least have not had a view; and if the officer has returned that they had a view, yet if at the trial it appears on examination that they have not had a view, the return will be to no purpose, and will not conclude any of the parties plaintiff or defendant: wherefore they resolved that the return was good enough without returning a view, which was not necessary to be returned, though it was necessary that the jury should have it. 3. They resolved that the first verdict was sufficient and good in law, on which the

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(c) Bro. Ancient
Demesne 20.
(d) Ibid.

Though the jury have a view, the officer need not return it, but the court at the trial ought to examine whether the jury had a view.

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(9) So in Bro. *Waste* 20, it is said, “can bring an action of waste in their
“that there is no action of waste in “hustings by their custom.”
“*London* by the statute; yet note, they

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The finding of particular waste is the substance of the verdict in waste.

The jury must find the particulars of the waste, otherwise the verdict is bad.

(b) Fitz. Waste 343.

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The commissioners ought not only to reverse the judgment, but also to give such judgment as the court of hustings ought to have done.

court of hustings ought to have given judgment for the plaintiff without quashing it and awarding a new *venire*; for the words, "waste, sale and destruction," are only the title of the verdict, and not the substance of it, and the finding of particular wastes is the substance of the verdict; and therefore if the title of the verdict contain more than is found by the verdict, it is but surplusage, which will not hurt the verdict which is perfect in itself; for if the jury had only found that the defendant "made waste, sale and destruction," and had not found the particulars of the waste, the verdict, had been bad and insufficient; therefore it appears, that the finding of the particular wastes, being the special matter, is the substance of the verdict, and then the false titling of it in a place not material will not make the verdict, which is well found in substance, vicious. Also the sale is not material of itself, as appears in East. 29 Edw. 3. 33. a. (b) where a writ of waste was brought for a chamber abated and sold, and the tenant pleaded that at the time of the lease it was too feeble, therefore it fell by tempest, and traversed that he abated it, and it was held a good answer, though he did not answer the sale; and to the same effect is *Longo Quinto* Edw. 4. 100. b.: and therefore they resolved that the first verdict was good and sufficient for the court of hustings to have proceeded to judgment without trying the matter *de novo*. 4. They resolved that the last verdict and the judgment given upon it was erroneous for two causes; one, because the last *venire* was awarded at the prayer of the defendant to beades of four wards which are not said to be the next wards to the place wasted; and it appears before in the record, that all the first four wards, out of which the first jury came to try the issue at first, were the four next wards to the place wasted; but two of the last four wards do not appear to be so; and therefore this was a trial not according to the custom; the other cause is, because the court of hustings quashed the first verdict where it was sufficient, and they ought to have given judgment upon it, and therefore they erred in their judgment. 5. They resolved that the judges commissioners ought not only to reverse the judgment in the hustings given for the defendant by which

the plaintiff was barred, and so restored the plaintiff to his action, but they ought also to give such judgment on the record before them, as the court of hustings ought to have done, namely, that the plaintiff shall recover the place wasted, and his treble damages, on the first verdict; and although *Dyer* (b) was cited, that where a writ of false judgment is brought on a judgment in a plea of land in ancient demesne where the demandant is barred by it, though the judgment be erroneous, yet the demandant shall only be restored to his action, and shall not have judgment to recover seisin of the land; for then, as the book says, a record will be of lands in ancient demesne out of the court of ancient demesne, which ought not to be, as it was urged; yet it was answered by the judges, that the commission to examine errors directed to them was a commission adapted and accommodated for the city of *London*, and commands and authorises them to make *full and speedy justice* to the parties, which they do not make, unless they give judgment for the plaintiff as well as reverse the judgment given against him, it appearing to them on the record that the court of hustings ought to have given such judgment for him, although they have given judgment against him; and as the case now is, if the judges will not give judgment for the plaintiff, the court of hustings cannot, and so there will be a failure of right. And therefore they held that where a writ in a real action is abated by judgment in the common bench, and on a writ of error this judgment is reversed in the king's bench, now the court of king's bench will proceed on the original writ, and give such judgment as the common bench ought to have given, if they had not given judgment to abate the writ, as appears in 4 Inst. 72. So where a special verdict was found in an ejectment in the king's bench in *Ireland*, and the court there gave judgment thereon for the defendant, if a writ of error be brought upon it, the court of king's bench here will not only reverse the judgment given in *Ireland*, but also will give such judgment as the king's bench in *Ireland* ought to have given, namely, that the plaintiff shall recover his term, and his costs and damages; and so it was done in the case of *Mulcarry and others v. Eyres and others*, Cro. Car. 511.

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(b) 373. b.
pl. 13.

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No costs reco-
verable in waste.

If the jury give
costs where none
are recoverable,
the court *ex*
officio ought to
give judgment,
" *nullo habito re-*
spectu" to the
costs, when it
appears judicially
that the plaintiff
is not entitled to
them.

And also there is a case where a writ which was abated in *Wales* was adjudged good, and the parties pleaded thereto in the king's bench; see for this 1 Roll. Abr. 774. (D.) pl. 2. Cro. Car. 509. *Coely v. Hoskins*, S. C. wherefore they concluded that the plaintiff should have judgment to recover on the first verdict. 6. And lastly they resolved, that judgment should be entered for the plaintiff for the place wasted and treble damages, " *no regard being had*" to the costs of suit taxed by the jury, for no costs of suit are recoverable in this action; and whereas it was objected, that the plaintiff in the hustings ought to have released the costs, and because he had not done so, the court did not err in not giving judgment for him on the first verdict, it was answered that the court *ex officio* ought to have given judgment at the prayer of the party, " *no regard being had*" to the costs, when it appears to them judicially that the plaintiff ought not to have recovered them (10).

And after the judges commissioners had delivered their opinions *seriatim* as aforesaid, they gave judgment, that all the proceedings had and made in the said cause for the said second trial after the said first verdict, and also the said second verdict, and the judgment given thereupon as aforesaid, be reversed, annulled, and altogether held for nothing, and that the said *William* (namely, the plaintiff in the hustings) do recover seisin against the said *Henry* (namely *Greene* the defendant) of the said places wasted by the view of the jurors of the said first inquisition, and his said damages on occasion of the said waste above found trebled according to the form in the statute, &c. which said

(10) By statute 8 and 9 W. 3. c. 11. s. 3. it is enacted, that in all actions of waste, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, the plaintiff obtaining judgment after plea pleaded or demurrer joined therein,

shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same.

treble

treble damages amount in the whole to 600l., and the said *Henry* thereof in mercy, &c. and likewise the said *William Cole* in mercy for his false claim against the said *Henry* for the residue of the said waste whereof the said *Henry* was acquitted by the said jury first impanelled, and as to the said residue of the said waste, let the said *Henry* go thereof without day, &c.

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Upon which judgment the said defendant *Greene* brought a writ of error in parliament, and assigned for error in fact, that the said first four wards out of which the first jury was impanelled were not the four wards next adjoining to the place wasted, but that the four wards out of which the last jury were impanelled were the four wards next adjoining to the place wasted, and because the custom of the city in the trial was not pursued, he said it was error; to which the said *Cole* the defendant in parliament pleaded *in nullo est erratum*; and it was said that the defendant in the hustings might have challenged the array if they were not returned out of the next wards, but he not having challenged the array then, cannot assign it for error now: to which it was answered, that there was no fault in the officer for which the defendant might have challenged the array, but it was the erroneous act of the court to award a venire to officers of wrong wards; as in an action where the venue on issue joined arises in *Dale* in the hundred of *Dale*, and the court awards a *venire facias de vicineto de Sale* in the hundred of *Sale*, now on the trial, if the hundredors of *Sale* appear, though there are no hundredors of *Dale*, the party cannot challenge for default of hundredors, because the officer has returned hundredors according to the writ of venire, although it was wrongly awarded; and therefore in such case it was error in the court to award such process of which the party cannot take advantage on the trial, but is to be aided by assigning it for error, so here; and of such opinion was *Wylde* justice of the common bench strongly. But afterwards it was resolved by the greater part of all the justices and barons, that though it was a wrong venire, yet it was aided by the statute of jeofails 21 Jac. 1. c. 13. for two of the said

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COLE.

wards appear to be next to the place wasted, and so the venue was misawarded only in part; wherefore by their opinions the judgment was affirmed before the lords in parliament after the end of this term.

From this it is observable, that the said statute extends to inferior courts, and is not restrained to the courts of *Westminster*, and that an action of waste, though treble damages are recovered in it, is not such an action penal as is excepted out of the said act of 21 Jac. 1. for it is provided that the statute shall not extend to any action on any penal statute; therefore it seems that this action is not founded on a penal statute within the intent of the proviso of the said statute of jeofails, although the statute of *Glocester* c. 5. gives treble damages in this action.

But it seems to me doubtful, whether this case be aided by the statute of 21 Jac. 1. or not; for the statute intends only to aid those proceedings which were at common law, where the venue was mistaken in part by the award of the court; but when an issue is not to be tried by a jury *de vicineto* of the place where the issue arises according to the common law, but is to be tried by a jury of four wards adjoining according to a special custom, which would be erroneous at common law (the venire not being awarded *de vicineto*) unless it was supported by a special custom, there, when the custom, which takes away the common law, is not pursued, it seems the statute does not extend to aid it. But

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it was adjudged as above, &c.

This case concerned one *Forth* an alderman of *London*, who had taken a lease from *Greene*, and had pulled down a brewhouse and built a number of small tenements in lieu thereof (11) for which *Cole* brought this action.

(11) In the report of this case in 1 Lev. 309. it is said, that by the building of the new houses, the rent was improved from 120l. to 200l. a year; and the jury on the second trial, on account

of this improvement, found a verdict for the defendant by the direction of *Wylde* the recorder; and afterwards a bill was filed in *Chancery* for an injunction to be relieved from this judgment, because

because the alleged waste was a melioration of the estate; and *Bridgman* Lord Keeper directed an issue to be tried at the bar of the court of king's bench, whether it was waste or not; and upon the trial, *Hale* being then chief justice, it was resolved to be waste notwithstanding the improvement, because the nature of the thing and of the evidence was altered; and the jury gave a verdict accordingly. *Ibid.* 311. 1 Mod. 94. *Cole v. Forth.*

Upon the same principle, if a tenant convert ancient meadow into arable, or arable or pasture into wood, or stub up or cut wood, and convert it into pasture, arable, or meadow; or if he convert meadow into an orchard, it is waste. *Dy.* 37. a. *Co. Litt.* 53. b. 2 *Roll. Abr.* 814. pl. 1. 6. 815. pl. 8. 2 *Leon.* 174. For it is generally true that the lessee has no power to change the nature of the thing demised. But he may stub up thorns, bushes, furze, and the like, growing in any meadow, arable or pasture; for that is good husbandry, and the land is improved by it, and the common gives such things to the tenant for fuel. *Dy.* 37. a. And if meadow be sometimes arable, and sometimes meadow, and sometimes pasture, the plowing of it is no waste. 2 *Roll. Abr.* 815. *So if the tenant pulls down a house, and rebuilds another not so long and wide as the other, it is waste. 2 *Roll. Abr.* 815. pl. 17. So if he rebuilds it more large than it was before, it is waste, for it will be a greater charge to the lessor to repair it. *Ibid.* pl. 18. It is a question whether it is waste to build a new house. *Keilw.* 38. b. *Hob.* 234.

2 *Roll. Abr.* 815. pl. 22. *Co. Litt.* 53. a. 11 *Mod.* 7.

Waste is either voluntary, or permissive, *Co. Litt.* 53. a. If the lessee pulls down the houses demised, or any part of them, as the windows, doors, shutters, fixtures, floors, or the like; or cuts down the fruit trees in a garden or orchard; or if lessee for life or years opens new mines in the land demised, where no mention is made in the lease of mines. *Co. Litt.* 53. b. 5 *Rep.* 12. *Saunders's case.* 2 *Mod.* 193. *Astry v. Ballard*; or digs for gravel, lime, clay, brick, earth, stone, &c. in pits not open. *Co. Litt.* 53. b. or cuts down timber, either oak, ash or elm, which are universally timber; or such trees as are timber by the custom of the country where they grow, such as beech, and the like; or changes the nature of the thing demised, as has been already mentioned—these acts amount to voluntary waste. But if the lessee suffers the houses demised to fall into decay for want of necessary repairs, this is permissive waste, and is equally within the provisions of the statute of *Gloucester*, 6 *Edw.* 1. c. 5. as voluntary waste is, *Co. Litt.* 53. a. See 1 *Bos. & Pull.* New Rep. 250. *Gibson v. Welles.*

But where the house was uncovered at the commencement of the lease, it is no waste in the tenant to suffer it to decay, without pulling it down. *Co. Litt.* 53. a. *OW.* 92, 93. *Glover v. Pipe.* So it is no waste, for the tenant to remove furnaces, coppers, or other utensils of trade, or marble chimnies though fixed to the freehold. 1 *Salk.* 368. *Poole's case.* 1 *Atk.* 477. *Ex parte Quincy.* 1 *P. Will.* 94. *Beck v. Ryebar.* 3 *Atk.* 13. *Lawton v. Lawton.* 1 *H.*

Black. 259. *Lawton v. Salmon*, note (a). But see *Elwes v. Maw*, 3 East, 38. So if lessee for life or years digs for metal, coal, and the like, in mines that were *open* at the time of the lease, where there is no exception of mines, it is no waste. Co. Litt. 53. a. 54. b. 5 Rep. 12. a. *Saunders's case*. 2 Roll. Abr. 816. pl. 31. So if a man has mines hid within his land, and leases his land, *and all mines therein*, it is no

waste for the lessee to open pits and dig for them: 5 Rep. 12. a. *Saunders's case*. But it is otherwise when the mines are *not granted by name*. Hob. 234. *Lord Darcy v. Askwith*. And, if in the case of an express grant of mines, there be open mines at the time of the lease, the lessee can only dig in the open mines, and not sink any new pits. Co. Litt. 54. b. 2 Roll. Abr. 816. pl. 32.

Case 43.

Radley & al^r, *versus* Eggesfield & al^r.

S. C. 2 Lev. 25,
1 Vent. 173.
2 Keb. 828.

Where the court
of admiralty has
jurisdiction of
the principal
matter, it has
jurisdiction of
every thing else
dependent upon
it.

ACTION on the statutes of 13 R. 2. c. 5. 15 R. 2. c. 3. & 2 H. 4. c. 11. for suing in the admiralty for a matter determinable at the common law; and the plaintiffs shew that the defendants libelled in the admiralty against the ship called the *Malmoy*, and against the now plaintiffs interposing for their interest, supposing that they, namely, the defendants were possessed of the said ship and goods laden on board the said ship, as of their own proper ship and goods, and that they were robbed and plundered of the said ship and goods, on the high sea by a private *Scotch* man of war; and that the said ship and goods after the said robbery came to the hands of the now plaintiffs, and on request made the now plaintiffs refused to deliver them to the defendants; whereas in truth they brought the said ship upon land within the body of a county, and not within the jurisdiction of the admiralty, and that the now defendants have proceeded in the admiralty and endeavoured to condemn the plaintiffs there, in contempt of the king, and against the statutes aforesaid, to the damage of the plaintiffs of 500l. The defendants pleaded not guilty.

And

And on a trial at bar this term the case on the evidence was such, namely, that the said ship and goods were taken from the defendants on the high sea by a *Scotch* privateer as a prize, supposing her to be a *Dutch* ship belonging to *Dutch* subjects in the time of the war between the *Dutch* and our king in the year 1666, and were carried by the privateer into *Scotland*, and condemned by the court of admiralty there as a lawful prize; afterwards the privateer sold them to another who sold them again on the land in *Scotland* to the now plaintiffs; who brought them here into *England* in the river *Thames*; and the defendants here having notice of it, arrested the ship and goods in the admiralty of *England*, and thereupon proceeded and libelled in the same court as above.

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& al^{vs}.
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FIELD & al^{vs}.

And the question was whether the defendants were within the penalty or meaning of the said statutes or not. And it was ruled by *Hale* chief-justice, *Twysden* and *Rainsford*, *Morton* justice being absent, that they were not; for the principal matter was the taking and robbing on the sea, of which the admiralty has jurisdiction, and upon that all the rest depends; and the property of the plaintiffs cannot be examined unless the taking be determined, which is proper for the admiralty to determine. And although it was urged that the ship and goods were adjudged lawful prize by the admiralty of *Scotland*, yet the court paid no regard to it, but said that they would not take notice of it, for the suit in the admiralty here is an original suit and not an appeal. And the validity of the sentence of the admiralty in *Scotland* is determinable by the law of the admiralty here, and not by the common law. And the court denied *Bingley's* case Hob. 78 & 113, and said that where a taking on the sea is the original foundation of the suit in the admiralty, as here it is, the admiralty may proceed to try and determine it, notwithstanding another claims property by sale made on land after such taking supposed to be made. And there-
upon

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& al'. v.
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FIELD & al'. upon by the direction of the court the defendants con-
sented to withdraw a juror, if the plaintiffs would not
proceed further to vex them any more, to which they
agreed ; whereupon a juror was withdrawn, and so the
matter ended.

Note, a prohibition was moved for in *Michaelmas* term
in the 22d year of the now king, to prohibit this very
suit in the admiralty, but was denied for the reason afore-
said.

DE

Term. Sancti Hill.

Anno Regni Regis, Car. II. 22 & 23.


Wood *versus* Longuevill.

Case 44.

Trin. 21 Car. 2. Regis. Rot. 1555.

*M*IDDLESEX to wit: Be it remembered that on *Friday* next after the morrow of the *Holy Trinity* in this same term, before our lord the king at *Westminster* came *Dorothy Wood* widow by *John Reid* her attorney, and brought her into the court of our said lord the king then there her certain bill against *Sir Thomas Longuevill* bart. in the custody of the marshal of a plea of trespass on the case, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit: *Middlesex* to wit, *Dorothy Wood* widow complains of *Sir Thomas Longuevill* bart. being in the custody of the marshal of the marshal-
 sea of our lord the king before the king himself, for that whereas on the 1st day of *April* in the year of our Lord 1643, a certain ordinance was made by the lords and earls of this realm of *England*, assembled in the parliament of our lord *Charles* the first, late king of *England*, held at *Westminster* in the county of *Middlesex*, by which said ordinance it was (among other things) ordained by the said lords and earls, that the estates, real and personal, of all such bishops, deans, deans and chapters, prebendaries, archdeacons, and all other person and persons ecclesiastical or temporal, who had raised or should raise arms against the then parliament, or had been or were in actual war against the same, or had voluntarily contributed, or should voluntarily contribute (not being under

A feigned issue
out of chancery.

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VILL.


the power of any part of the royal army at the time of such contribution) any horses, money, plate, arms, ammunition, or any aid or assistance for or towards the maintenance of any forces raised against the then parliament, or for opposing any force or power levied by the authority of both houses of parliament, or for robbing, spoiling, plundering, or destroying the subjects of our said late king *Charles* the first, who had voluntarily contributed, or paid obedience to the commands of both houses of the then parliament, and of all such as had joined or should join in any oath, or act of association against the then parliament, or had imposed or should impose any tax, or assessment, on the subjects of the royal majesty, for or towards the maintenance of any forces against the said then parliament, or had used or should use any force or power to levy the same, should forthwith be seized and sequestered into the hands of sequestrators and committees afterwards named in the said ordnance, and of such other persons as should at any other time afterwards be appointed and named by both houses of the then parliament, for any county, city, or place within the realm of *England*, or dominion of *Wales*; which said sequestrators and committees, or any two or more of them, in every several county, city, or place respectively, were by the said ordinary authorised and required by themselves, their agents and deputies, to take and seize into their hands and custody, all well all the money, goods, chattels, debts and personal estate, as also all and every the manors, lands, tenements, hereditaments, rents and arrears of rents, revenues and profits of all and every such delinquents or persons theretofore specified, or which they or any of them, or any other had, or could, or might have in trust for them or any of them, or to the use of them, or any of them; and also two parts of all the money, goods, chattels, debts and personal estate, and two parts of all and every the manors, lands, tenements, hereditaments, rents, arrears of rents, revenues and profits of all and every papist, or which any other person had in trust for any papists, or to the use of any papists, and to set, let and demise the same or any part thereof as the respective landlord or owners thereof could do from year to year, and should have power to call before them or any two of them, all
stewards,

stewards, bailiffs, collectors of rents, auditors, or any officers or servants as well of the said archbishops, bishops, deans, deans and chapters, prebendaries and archdeacons, as of all and every other the said delinquents or persons before specified, and to send for and take any books of accounts, rentals, copies of court-rolls, or other evidences, writings, or memorials touching the premises or any of them, and by all other ways and means, which to the said sequestrators, or any two or more of them should seem fit and necessary, to inform themselves, as well of the said several delinquents and every of them, as of their several estates, possessions, rents, arrears of rents, revenues and profits, goods and chattels, estates real and personal, and the true value of the same, and of all things touching the same or any part thereof, and to appoint any officer or officers, or other person or persons under them, for the better expediting of the said service; which said persons were by the said ordinance authorized and enjoined to perform and execute all and every the commands of the said sequestrators or committees, or any two or more of them respectively, in and concerning the premises, and should have such allowances for their labour and trouble in that behalf as the said sequestrators or committees, or any two or more of them should think fit; and the said sequestrators or committees, or any two or more of them respectively, their agents and deputies, within their several limits, should have power, and were by the said ordinance authorized and required, to enter into all and every such manors, messuages, lands, tenements, and hereditaments of all and every the said delinquents, or persons theretofore specified, and to receive such rents, arrears of rents, heriots, issues, profits, sums of money, debts, and other debts as aforesaid due or payable to them or any of them for their or any of their several and respective tenants, or other person or persons; which said tenants and other persons were by the said ordinance required to pay the same to the said sequestrators or committees, or any two or more of them accordingly, and not to, or to the use of, the said delinquents, or any of them, yet so that, in respect of the hardness of the times, and of the great burdens which otherwise lay on the said tenants and others, on account of the

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the then present war, every such tenant, who should pay the said sequestrators or committees, or any two of them as afore said, on their obedience and conformity to the said ordinance, should be considered in the said rents, revenues and profits, and should be discharged from the whole rent against their landlords or any other to whom the same was due, being such delinquents as afore said: and as well the said tenants, as every other person or persons who should pay any rent, sum of money, or other thing according to the said ordinance, should be protected and indemnified by the power and authority of both houses of parliament, from any forfeiture, penalty or damage, which he or they might incur by the non-payment of their said rent, sum of money, or other thing, according to their lease, copy, or agreement; and if any such tenant or tenants should refuse to pay his or their rent or rents to the said sequestrators or committees, their agents or deputies, according to the said ordinance, at such time and places as the same should become due and payable, the said sequestrators or any two or more of them by themselves, their agents, or deputies should have power to distrain for the same, and have all other advantages for the non-payment thereof as a landlord could have; and the said sequestrators, or any two or more of them, should have power to sue for and recover any debt, sum of money, or other debt due to the said delinquents or persons theretofore specified, or to any of them, and also to give discharges and acquittances for any rent, sum of money, debts, debt or other thing which they should receive from the estates of the said delinquents, or any of them, and should be accountable from time to time for the same, and for all such other things as should be had and taken by them, their agents or deputies, and for all their receipts and payments and other acts for or in respect of the premises, to both houses of parliament, or such persons as they should appoint, and should pay all such sums of money as they or any of them, should receive from the said estates to the treasury at Guildhall, *London*, and should keep books of account, and be from time to time subject to the further orders and directions of both houses of parliament, for allowance to the said delinquents or otherwise as the cause should require, as to all their

their receipts and payments; and the said sequestrators or committees, or any two or more of them, their agents and deputies, should have power to call to their aid and assistance the trained bands, volunteers, or any other forces of or within their several counties, cities, or respective places, or any other person or persons inhabiting in or at the next place, to enforce obedience to the said ordinance, where any resistance should be made, or as often as need should require; and should have power to punish such person or persons as they should find refractory, negligent or deficient in the said service by fine and imprisonment, such fine not exceeding the sum of 20l., or to certify their names to the committees of lords and commons appointed for that service, who should have power to send for them, or any of them, and commit them to such prisons and places, and for so long a time as they should think fit; and the said trained bands, volunteers, and other forces, their leaders and officers, and also the several constables of tithings, and other officers and persons within their limits, were by the said ordinance required and enjoined to be aiding and assisting the said sequestrators, or any two or more of them as often as they should be required. And it was further declared and ordained by the lords and earls that all and every the said sums, rents, revenues, and profits of the estate real and personal of all and every the said delinquents, or persons theretofore specified, should be expended for the use of, and for the maintenance of the army and forces levied by the then parliament, and such other uses as should be directed by both houses of parliament for the benefit of the commonwealth; and lastly, it was ordained that all and every the said sequestrators and committees should have an allowance for their necessary expences and trouble in and about the premises, such as should be allowed by both houses of parliament; and that as well they, as all others who should be employed in the said service, or should do any thing in execution or performance of that ordinance, should be protected and saved harmless therein by the power and authority of the said two houses. And whereas also by a certain other ordinance made in the said parliament, on the 6th day of *February* in the year of our Lord 1646, by the lords and earls in the same parliament assembled,

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assembled, it was ordained that several persons named in the said ordinance, or any seven of them, of whom three of them should be members of parliament, where by the said ordinance commissioners to sit at *Goldsmith's Hall* for compounding with the delinquents, and to act according to the several and respective ordinances or orders before then made by both or either house of parliament concerning the committee at *Goldsmith's Hall*. And whereas also by a certain act made on the 25th day of *January* in the year of our Lord 1649, in the then pretended parliament held at *Westminster* aforesaid, it was (amongst other things) enacted by the authority of the same parliament, that from and after the 20th day of *December* in the year of our Lord 1649, the ordering, managing, letting, setting, and disposition of the estates of papists and delinquents should be and by the said acts were vested in commissioners for compounding with delinquents in such manner as was afterwards in the said act expressed, and that the said commissioners for compounding should have and exercise all such power and authority in and about the sequestering, ordering, and disposing of such estates as had heretofore been granted by any ordinance or act of parliament for sequestrations to any committee for sequestration, and that the intire rents, revenues and profits of the said sequestrations and sequestered estates should be paid into the treasury at *Goldsmith's Hall* for the sole use, intention and purpose aforesaid. And whereas also by a certain act made the 15th day of *April* in the year of our Lord 1650, in the then pretended parliament held at *Westminster* aforesaid, it was (among other things) enacted by the authority of the same parliament, that S. M., J. R., E. W., J. B., M. W., A. S. junr., and R. M. esqs. or any four or more of them should be, and by the said act were constituted and appointed commissioners for compounding with delinquents, and for managing all and every the estates of delinquents and papists recusants who then were, or from thence after should be under sequestration, and that the said commissioners, or any four or more of them, should and might, and by the said act were authorised, enabled, and required from and after the 22d day of *April* in the year of our Lord 1650, to observe and put in execution

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execution all and every the powers, and instructions before then given and then in force, by virtue of any act, ordinance or order of parliament, to commissioners appointed by authority of parliament, for compounding with delinquents, and for managing all the estates under sequestration, as also all and every the powers, authorities, and instructions before then given, and then in force, by virtue of any act, ordinance or order of parliament, to the committee of lords and commons for advance of money before then sitting in *Huberdassers* Hall, any act, ordinance, or order of parliament before that time to the contrary in any wise notwithstanding. And whereas also by a certain other additional act made the 18th day of *November* in the year of our Lord 1652, in the then pretended parliament held at *Westminster* aforesaid, reciting that whereas the estate of *Andrew Young* of in the county of *York*, esq. lately called *Sir Andrew Young* knt., and of divers other persons named in the said act, had been and were by the said act declared and adjudged to be justly forfeited by them for their several treasons against the parliament and people of *England*, therefore it was enacted by the said parliament, and the authority of the same, that all the manors, lands, tenements, and hereditaments of which he the said *Sir Andrew Young*, and the other persons in the act named, or any of them, or any person for their use or in trust for any of them, were seized or possessed of, in possession, reversion or remainder, on the 20th day of *May* in the year of our Lord 1642, or at any time since, and all rights of entry, and all the estate, right, title, and interest of them, and every of them, in or to the said manors, lands, tenements or hereditaments, which they or any of them had on the said 20th day of *May* in the year of our Lord 1642, or at any time since, except rectories, impropriate tithes, compositions for tithes, portions of tithes, donatives, oblations, obventions, and rents issuing out of tithes, were and by the said act were vested, adjudged, and reputed to be, and were by the said act in the real and actual possession and seisin of W. S., W. R., M. V., S. G., H. S., W. L. and A. S., and the survivor and survivors of them and their heirs and assigns, and that they and the survivor and survivors of them and their heirs, should and might have the benefit and

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advantage of the said rights and entries to the said manors, lands, tenements and hereditaments, and each and every of them, and that they and their heirs and assigns should hold all and every part and parcel of the said manors and premises as of the manor of *East Greenwich* in free socage by fealty only, and by no other tenure or service whatsoever, upon trust and confidence nevertheless, that the said W. S. and the other persons before named, or any five or more of them should have, hold, and enjoy all and singular the premises, and every part thereof, subject to such parts and uses as by the said act, or in or by the authority of parliament should be afterwards directed and appointed: saving to all and every person and persons, bodies politic and corporate, their heirs, successors, executors, administrators and assigns and every of them, (other than the said Sir *Andrew Young* and the other persons named in the said act, or any of them, and all others claiming or to claim by, from, or under them or any of them, or to the use of, or in trust for, them or any of them, from the 20th day of *May* in the year of our Lord 1642, and other than the rights and titles of the respective wife and wives of them or any of them), all such estates, interests, rents, incumbrances, charges, rights in law or equity, which they or any of them had or ought to have in or to the said manors, lands, tenements, or hereditaments, or any of them before the said 20th day of *May* in the year of our Lord 1642; as also all and every the estates and interest given, granted, demised, allowed or confirmed by any act or ordinance of parliament, or lawful authority derived from them, to any person or persons, body politic or corporate who had constantly adhered, and been faithful to the said parliament, and whose estates had not been otherwise revoked or changed by the said parliament, if such person or persons, body politic or corporate, their heirs, successors or assigns, should deliver in writing to the commissioners appointed by an act intituled "an act for transferring the power of committees for obstructions," or any four or more of them, a particular of such his or their right, title, interest, claim, demand, charge, incumbrance, or estate in law or equity, or should obtain an allowance thereof before the said commissioners, or any four or more of them, which said commissioners appointed by the said act should be commissioners for

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for removing obstructions in the sale of all and every the premises by the said act appointed to be sold, and should have, use, and exercise all and every the like powers and authorities in reference to the premises by the said act appointed to be sold, as the said commissioners could or ought to do in relation to the sale of any other lands and estates mentioned in an act intituled "an act for the sale of the several lands and estates forfeited to the commonwealth for treason;" and the trustees, treasurers, registers, accountants, general supervisors, and all other persons employed in and about the said service, were required to observe such orders and directions as they should receive from time to time from the said commissioners; and the said commissioners should and might allow all incidental expences necessary for the carrying on of the said service; and the said trustees, or any five or more of them respectively, should and might, and were required and authorised by the said act to contract, bargain, sell, alien, and convey all and every the said manors and premises, and execute all powers and authorities in the sale thereof according to the rates, proportions, rules, and directions limited and expressed in the said former act, intituled "an act for the sale of several lands and estates forfeited to the commonwealth for treason," and in such manner as they could or might do in the sale of any manors or lands vested and settled in them by the before-mentioned act: Provided always, that the trustees named in the said act should not treat or contract with any person or persons, body politic or corporate, for the purpose of any manors, lands, tenements, or hereditaments by the said act exposed to be sold, until the expiration of thirty days next after the return of the respective surveys and survey thereof; provided also, and it was enacted and declared by the said act, that it should and might be lawful to and for any person or persons, whose estates were by the said act exposed to sale, and his and their heirs and assigns, notwithstanding any clause, article, or thing contained in the said present act, to compound for any manors, lands, tenements, or hereditaments of or belonging to such person or persons, in such manner, and according to the rules and directions, and upon such conditions as was afterwards expressed in and

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by the said act, as by the same act (among other things) more fully appears. And whereas also by a certain act of general pardon, indemnity, and oblivion made and provided in the parliament holden at *Westminster* on the 25th day of *April* in the year of our Lord 1660, and in the 12th year of our lord *Charles* the second now king of *England*, &c. it was (among other things) enacted by the authority of the same parliament, that no person or persons, who, by virtue of any order, or warrant mediately or immediately derived from his late royal majesty, or from the royal majesty which is, or by virtue of any act, ordinance, or order of either or both houses of parliament, or of any authority specified in the said act, or of any committee or committees acting under them, or any of them, had seized, sequestered, levied, advanced, or paid to any public use, or into any public treasury within this realm, any goods, chattels, debts, rents, sum or sums of money belonging to any person or persons whatsoever, should thereafter be sued, molested, or drawn in question for the same; but that they and every of them should be discharged against all persons for so much, and no more, of the said goods, chattels, debts, sum or sums of money as their several and respective order of discharge or acquittances should extend unto, as by the said act (among other things) more fully appears. And whereas also one *Henry Mitford* gent. and *Elizabeth* his wife were seized of and in two messuages and one cellar with the appurtenances, in the town of *Newcastle upon-Tyne* in the county of the same town, in their demesne as of fee, in right of the said *Elizabeth*; and the said *Henry* and *Elizabeth* being so thereof seized, a fine was levied in the court of the lord *Charles* the first late king of *England*, at *Westminster*, on the octave of *St. Michael* in the 13th year of his reign, before *John Finch*, *Richard Hutton*, *George Vernon* and *Francis Crawley* justices, and other faithful subjects of the said late king then there present, between the said *Andrew Young* by the name of *Andrew Young* esq. plaintiff, and the said *Henry* and *Elizabeth*, by the names of *Henry Mitford* gent. and *Elizabeth* his wife deforceants, of the tenements aforesaid with the appurtenances, by the names of two messuages and one cellar with the appurtenances in the town of *Newcastle-upon-Tyne*,

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Tyne, whereof a plea of covenant was summoned between them in the said court, to wit, that the said *Henry* and *Elizabeth* acknowledged the said tenements with the appurtenances to be the right of him the said *Andrew*, as those which the said *Andrew* had of the gift of the said *Henry* and *Elizabeth*, and the same remitted and quit claimed from them the said *Henry* and *Elizabeth*, and the heirs of him the said *Henry* to the said *Andrew* and his heirs for ever; and further the said *Henry* granted for himself and his heirs, that they would warrant to the said *Andrew* and his said heirs the tenements aforesaid with the appurtenances against all men for ever, as by the said fine remaining in the court of our said lord the now king of the bench at *Westminster* aforesaid more fully appears; which said fine was to the use of the said *Andrew Young* and his heirs; by virtue of which said fine, and the statute for transferring uses into possession, the said *Andrew* was seised of the said tenements with the appurtenances in his demesne as of fee: and the said *Andrew* being so seised thereof afterwards, to wit, on the 21st day of *February* in the said 13th year of the reign of the said late king *Charles* the first, at the town of *Newcastle-upon-Tyne* aforesaid, by a certain indenture made between the said *Andrew* of the one part, and the said *Henry Mitford* and *Elizabeth* of the other part (which other part, sealed with the seal of the said *Andrew*, the said *Dorothy* brings here into court, the date whereof is the same day and year aforesaid), it was declared and agreed by and between the said parties to the said indenture, and their true intent and meaning was, that if the said *Henry Mitford* or *Elizabeth* his wife, or either of them, or the heirs or assigns of them or either of them, at any time before the feast of the purification of the blessed virgin *Mary*, called *Candlemas*, or the feast of *St. Peter ad vincula*, called *Lammas*, should pay to the said *Andrew Young*, his heirs or assigns, the sum of 400*l.* and in the meantime and until that sum should be paid, should pay yearly to the said *Andrew Young*, his heirs, executors, administrators or assigns, or any of them, the sum of 32*l.* at the said feasts of the purification of the blessed virgin *Mary*, called *Candlemas*, and of *St. Peter ad vincula*, called *Lammas*, by equal portions, that then he the said

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Andrew Young, his heirs or assigns, should and would re-convey and assure back, to the said *Henry Mitford* and *Elizabeth* his wife, and their heirs and assigns and to their use, the said two messuages and cellar with the appurtenances, free and discharged of and from all and all manner of incumbrances whatsoever made or permitted by the said *Andrew Young* his heirs or assigns, as by the said indenture more fully appears; and afterwards the said *Henry* at the town of *Newcastle-upon-Tyne* died; after whose death, and before the payment of the said 400l. made to the said *Andrew Young*, to wit, on the 6th day of *April* in the year of our lord 1643, at the town of *Newcastle-upon-Tyne* aforesaid, by certain articles of agreement indented made between the said *Elizabeth*, by the name of *Elizabeth Mitford* of *Dockham-house* in the county of *Durham* widow, of the one part, and one *Edward Wood* then the husband of her the said *Dorothy*, by the name of *Edward Wood* of the town of *Newcastle-upon-Tyne* draper, of the other, (one part of which said articles, sealed with the seal of the said *Elizabeth*, the said *Dorothy* brings here into court, the date whereof is the same day and year aforesaid,) it was agreed by and between the said parties to the said articles, and the said *Elizabeth* for herself and her heirs covenanted, promised and granted to and with the said *Edward Wood*, his heirs, executors, and administrators by the said articles, that she the said *Elizabeth Mitford* and her heirs should and would for and in consideration of the sum of 700l. of lawful money of *England*, in hand paid or secured, by the said *Edward Wood*, before the sealing and delivery of the said articles, 300l. of which she the said *Elizabeth Mitford* acknowledged herself to be fully satisfied and paid, and of the residue being 400l. sufficiently secured, the receipt of which said 300l. she acknowledged by the said articles, on or before the feast of *St. Michael* the Archangel next following the date of the said articles, well and sufficiently, and freely and absolutely convey to the said *Edward Wood* and his heirs, to the use of the said *Edward Wood* and his heirs, at the costs and charges in the law of him the said *Edward Wood*, or his heirs, the tenements aforesaid with the appurtenances, by the names of all those two messuages or burgages with the appurtenances, situate and being within the town of *Newcastle-upon-Tyne*,

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on the eastern side of the street or place there called the *Sandhill*, late in the several and respective tenures and occupations of E. M. merchant, M. G. widow, and E. H. widow, bounded by a messuage or burgage then in the possession of R. G. merchant on the south, a messuage or burgage then in the possession of the said E. H. on the north, and on the said street called the *Sandhill* on the west; and of all that cellar or warehouses, situate in the said town of *Newcastle-upon-Tyne*, in a street there called *Allhallowbank*, then in the possession of the said E. H., abutting on a messuage or burgage then in the possession of R. B. carpenter on the east, a messuage or burgage then in the possession of R. B. on the west, a messuage or burgage late in the possession of the said E. M., M. G., and E. H. on the south, and the said street called *Allhallowbank* on the north side; together with all houses, edifices, buildings, lofts, rooms, chambers, shops, cellars, follers, entries, easements, ways, waters, passages, profits, advantages and appurtenances whatsoever, to the said several messuages or burgages and cellar or warehouse belonging, or with the same usually occupied and enjoyed, and all and singular deeds, writings, muniments and evidences touching and concerning the said premises with the appurtenances, which she the said *Elizabeth Mitford* had in her hands or custody, or could come to without suit at law, and true copies of so much thereof as did only concern the said premises among others, as by the counsel learned of the said *Edward Wood* and his heirs should be devised or advised. And it was further condescended, concluded and agreed upon by and between the said parties to the said articles, and she the said *Elizabeth* for herself and her heirs covenanted, promised, and agreed to and with the said *Edward Wood*, his heirs, executors, administrators and assigns, that she the said *Elizabeth Mitford* then was, and at the time of making the said conveyance or assurance was lawfully seised to her and her heirs of and in the said premises with the appurtenances of and in a good, pure, perfect and indefeasible estate in fee-simple or fee-tail, without any condition, provision, limitation of use or uses, to alter, charge or determine the same; and that she the said *Elizabeth Mitford* then at the time of making the said articles, had good right and lawful

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she was lawfully
seised,

and had right
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authority in the law to convey and assure the said premises with the appurtenances to the said *Edward Wood* and his heirs; and that the said premises with the appurtenances then were, and at all and every time and times after the making of the said conveyance or assurance should remain, continue and be to him the said *Edward Wood* and his heirs discharged, or otherwise well and sufficiently indemnified, preserved and kept harmless of and from all and all manner of former and other bargains, sales, gifts, grants, trusts, assignments, leases, judgments, statutes merchant and staple, recognizances, rents, charges and arrears of rents, annuities, seizures and causes of seizure, debts and duties of record, jointures, dowers and titles of dower, and of and from all other charges, titles, disturbances and incumbrances whatsoever before then had, made, committed or done, or promised to be had, made, committed or done by her the said *Elizabeth Mitford*, or by any other person or persons claiming or deriving title by, from or under her; always excepting out of the said articles all such former estate or assurance made of the said premises with the appurtenances by a certain indenture, bearing date the 21st day of *February* in the 13th year of the reign of the said late king *Charles* the first, made between the said *Andrew Young*, by the name of *Andrew Young* of *Bourne* in the county of *York* esq. of the one part, and the said *Henry Mitford* then the husband of the said *Elizabeth Mitford*, and her the said *Elizabeth* of the other part; and that she the said *Elizabeth Mitford* and her heirs should and would, at all and every time, and times thereafter within the space and time of seven years next following the date of the said indenture or conveyance, at the request, and at the costs and charges in the law of him the said *Edward Wood* and his heirs, make, do, acknowledge, levy, suffer and execute, or cause to be made, done, acknowledged, levied, suffered and executed, all and singular such further act and acts, thing and things, assurance or assurances in the law whatsoever of the said premises with the appurtenances, for the better and more sure making of the same to the said *Edward Wood* and his heirs, as by the counsel learned of him the said *Edward* or his heirs should be advised

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or devised, whether they should be by fine or fines with or without proclamation, deed or deeds indented or enrolled, enrolment of the said articles, deed or deeds of feoffment with livery of seisin thereon indorsed, common recovery or recoveries with double or single voucher or vouchers, or by all or any other way, or ways or means whatsoever; provided always that the said *Elizabeth Mitford* or her heirs should not be compelled to travel for the doing thereof further than the city of *Durham*, or the town of *Newcastle-upon-Tyne*, as by the said articles more fully appears. By virtue whereof the said *Edward* was intitled to the equity of redemption of the said tenements with the appurtenances of the said *Andrew Young*, upon payment of the said 400l. with interest to be as aforesaid paid; which said *Edward* being so entitled to the equity of redemption of the said tenements with the appurtenances afterwards, to wit, on the 10th day of *December* in the year of our lord 1650, at the town of *Newcastle-upon-Tyne* aforesaid, made his last will and testament in writing, and thereby gave and devised to the said *Dorothy* then his wife, all his estate whatsoever in the premises, and afterwards there died so as aforesaid entitled. And whereas also on the 1st day of *May* in the year of our Lord 1649, the greatest part of the estate of the said *Andrew Young* as a popish delinquent in the northern parts of this realm of *England*, other than the said tenements aforesaid with the appurtenances in the said town of *Newcastle-upon-Tyne* aforesaid, was sequestered by virtue of the said ordinance and acts made in that behalf, but the estate of the said *Andrew Young* in the said tenements with the appurtenances in the said town of *Newcastle-upon-Tyne*, was not sequestered or discovered before the year of our Lord 1652. And whereas also afterwards, to wit, on the 29th day of *December* in the year of our Lord 1652, at *Westminster* aforesaid, the said *Dorothy* in due manner delivered to the said commissioners for the removing of obstructions, a particular in writing of her right, title, demand and estate in and to the said tenements with the appurtenances, and afterwards, to wit, on the 12th day of *August* in the year of our Lord 1653, the said commissioners ordained that the right of redemption should be allowed to the said *Dorothy* of and in the said premises,

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mises, on an oath to be made by the said *Andrew Young* that the said indenture, dated the 21st day of *February* in the year of our Lord 1637, was duly sealed and delivered by him the said *Andrew Young*; and afterwards, to wit, on the 24th day of *July* in the year of our Lord 1655, upon producing the affidavit of the said *Andrew Young* to the purport aforesaid, the said commissioners ordered that the said interest and claim of the said *Dorothy* of and in the said premises should be allowed, and that the first order of the 12th of *August* should be absolute, and the judgment and determination of the said commissioners should be transmitted to the said trustees for sale of the said lands to be by them entered and observed according to the tenor and purport thereof, and as by the said act of sale was directed and appointed: and afterwards, to wit, on the 22d day of *July* in the year of our Lord 1653, at *Haberdashers' Hall* in the parish of *St. Anne* in the ward of *Aldersgate, London*, it was ordained by the said then commissioners for the advance of money, &c. authorised as aforesaid, by virtue and in pursuance of the said act of the said 15th day of *April* in the said year of our Lord 1650, that the said *Dorothy*, within 14 days then next following, should pay into the treasury of the said commissioners the said 400l. as money due to the commonwealth, by reason of the delinquency of the said *Andrew*: in obedience of which said order the said *Dorothy* afterwards, to wit, on the 11th day of *August* in the said year of our Lord 1653, at *Haberdashers' Hall* aforesaid in the parish and ward aforesaid, paid to *R. S. esq.* and *J. L. esq.*, then treasurers of the said commissioners, the said 400l. And whereas also on the 20th day of *July* in the said year of our Lord 1653, a survey of the said two messuages and cellar was made and returned to the said trustees named in the said act of the said 18th day of *November* in the said year of our Lord 1652, as of the estate of the said *Andrew Young* in fee-simple, and afterwards and within 30 days then next following, to wit, on the 4th day of *August* in the said year of our Lord 1653, at *London* aforesaid in the parish and ward aforesaid, the said *Andrew Young* petitioned the said commissioners for the advance of money, that he might compound with the said com-
missioners

missioners for the said tenements with the appurtenances according to the intent of the said act, but the said commissioners then and there altogether refused to admit the said *Andrew* to such composition. And whereas also afterwards, to wit, on the 24th day of *August* in the said year of our Lord 1653, at *London* aforesaid in the parish and ward aforesaid, one *John Blunt* gent. compounded with the said trustees to pay them 60*l.* in double bills, for the purchase of the said tenements with the appurtenances to him the said *John Blunt* and his heirs for ever, and by reason thereof the said trustees after the payment of the said 60*l.* in due manner to their treasurer for the use of the commonwealth, to wit, on the 2d day of *March* in the said year of our Lord 1653, at *London* aforesaid in the parish and ward aforesaid, in consideration thereof, by a certain indenture made between the said trustees of the one part, and the said *John Blunt* of the other part, bearing date the same day and year aforesaid, and afterwards and within six months then next following duly inrolled of record in the court of chancery of the said lord the king at *Westminster* aforesaid, bargained and sold to the said *John Blunt* the said tenements with the appurtenances, to have and to hold to the said *John Blunt* his heirs and assigns for ever; and afterwards, to wit, on the 30th day of *November* in the year of our Lord 1654, at *Westminster* aforesaid, a certain order was made by the said then pretended commissioners for removing obstructions, that the said *John Blunt* should have possession of the said tenements according to his said purchase from the said trustees and the sale thereof; after the making of which said last mentioned indenture, to wit, on the 24th day of *May* in the year of our Lord 1655, at *Westminster* aforesaid, the said *Andrew Young*, by a certain indenture made between him the said *Andrew* by the name of *Andrew Young of Bourne* in the county of *York* esq., of the one part, and the said *John Blunt*, by the name of *John Blunt* of the Middle Temple gent., of the other part, bearing date the same day and year aforesaid, for and in consideration of 5*l.* to him in hand paid by the said *John Blunt*, demised, granted, bargained, sold, and to farm let to the said *John Blunt* the tenements with the appurtenances, to have and to hold to the said *John Blunt*

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sale pleaded.

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Blunt and his assigns from the 23d day of *May* then last past, to the end and term of one whole year thence next following, and fully to be compleat and ended ; and afterwards, to wit, on the 25th day of *May* in the said year of our Lord 1655, at *Westminster* aforesaid, the said *Andrew* by a certain other indenture made between the said *Andrew Young* of the one part, and the said *John Blunt* of the other part, bearing date the same day and year aforesaid, for and in consideration of 275l. by the said *John* in hand paid to the said *Andrew*, remised, released and confirmed to the said *John*, then being in the full and peaceable possession of the said tenements with the appurtenances, the said tenements with the appurtenances, To have and to hold to the said *John*, his heirs and assigns for ever ; by virtue of which said premises, and by force of a certain act made and provided in the parliament of the lord *Henry* the eighth, late king of *England*, holden at *Westminster* in the county of *Middlesex*, the 4th day of *February* in the 27th year of his reign, for transferring uses into possession, the said *John* was seised of the said tenements with the appurtenances in his demesne as of fee ; and afterwards the said *Andrew Young* died, after whose death the said *Thomas Longuevill* married *Mary Young* the widow of the said *Andrew*. And afterwards, to wit, on the 3d day of *November* in the year of our Lord 1662, at *Westminster* aforesaid, the said *Elizabeth Mitford* by a certain indenture made between the said *Elizabeth* of the one part, and the said *Dorothy Wood* of the other part, (one part of which said indenture sealed with the seal of the said *Elizabeth*, the said *Dorothy* brings here into court, the date whereof is the same day and year aforesaid), for and in consideration of a certain sum of money to the said *Elizabeth*, by the said *Dorothy* in hand paid, demised, granted, bargained and sold to the said *Dorothy* the said tenements with the appurtenances, To have and to hold the said tenements with the appurtenances to the said *Dorothy* and her assigns, from the 2d day of *November* then last past to the end and term of one whole year thence next following, fully to be compleat and ended : and afterwards, to wit, on the 4th day of *November* in the said year of our Lord 1662, at *Westminster* aforesaid, the said *Elizabeth Mitford*, by a certain other indenture made between the said *Elizabeth* of the one part, and the

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the said *Dorothy* of the other part (one part whereof sealed with the seal of the said *Elizabeth* the said *Dorothy* brings here into court, the date whereof is the same day and year aforesaid), for and in consideration of a certain sum of money to the said *Elizabeth* by the said *Dorothy* in hand paid, granted, bargained, sold and released to the said *Dorothy* the said tenements with the appurtenances, to have and to hold the said tenements with the appurtenances to the said *Dorothy*, her heirs and assigns for ever. And afterwards, to wit, on the 3d day of *January* in the year of our Lord 1666, the said *John Blunt*, being in form aforesaid seised of the said tenements with the appurtenances, at *Westminster* aforesaid, by a certain indenture made between the said *John* of the one part, and the said *Thomas Longueville* and *Mary* his wife of the other part, for and in consideration of 5s. to the said *John* by the said *Thomas Longueville* and *Mary* in hand paid, demised and granted to the said *Thomas* and *Mary* his wife, the said tenements with their appurtenances, to have and to hold to the said *Thomas* and *Mary* and their assigns, from the 2d day of *January* then last past, to the end and term of one whole year from thence next following and fully to be compleat and ended; by virtue of which said demise the said *Thomas* and *Mary* entered into the said tenements with the appurtenances, and were thereof possessed as the law requires; and the said *Thomas* and *Mary* being so possessed thereof, and the said *John Blunt* being seised of the reversion of the said tenements with the appurtenances in his demesne as of fee, he the said *John* afterwards, to wit, on the 4th day of *January* in the said year of our Lord 1666, at *Westminster* aforesaid, by a certain other indenture made between the said *John* of the one part, and the said *Thomas* and *Mary* of the other part, bearing date the same day and year aforesaid, for and in consideration of a certain sum of money to the said *John* by the said *Thomas* and *Mary* in hand paid, granted, released, bargained, and sold to the said *Thomas* and *Mary*, the said tenements with the appurtenances, to have and to hold to the said *Thomas* and *Mary*, and the heirs and assigns of the said *Mary* for ever; by virtue of which said grant and release, and by force of the said act for transferring uses into possession, the said

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A discourse was
had and moved
between plaintiff
and defendant
concerning the
premises.

Thomas and Mary were and yet are seised of the said tenements with the appurtenances of such estate as the law requires. And whereas also on the 10th day of *April* in the 20th year of the reign of our lord *Charles* the second now king of *England* &c. at *Westminster* aforesaid in the said county of *Middlesex*, a certain discourse was had and moved between the said *Dorothy* and the said *Thomas Longuevill* concerning the premises, and thereupon the said *Dorothy* then and there affirmed to the said *Thomas*, that the said payment of the said 400l., made by the said *Dorothy* to the said commissioners for advance of money at *Haberdashers' Hall* aforesaid, during the said time of the usurpation of the government of this realm of *England*, was such a payment within the intent of the said act of indemnity and oblivion, as was made good and effectual by that act, so that the said *Dorothy* upon the whole matter aforesaid, ought to have an allowance of the said payment upon a redemption to be made of the mortgage of the said tenements, which said affirmation of the said *Dorothy* the said *Thomas* then and there denied, whereupon the said *Thomas*, on the said 10th day of *April* in the 20th year aforesaid at *Westminster* aforesaid, in consideration of 10l. by the said *Dorothy* to the said *Thomas* at his special instance and request then and there in hand paid, undertook, and to the said *Dorothy* then and there faithfully promised that

[278] if the said payment of the said 400l. so as aforesaid made by the said *Dorothy* to the said commissioners for the advance of money at *Haberdashers' Hall* aforesaid, was a good and effectual payment within the intent of the said act of indemnity and oblivion, then the said *Thomas* would well and faithfully pay and content the said *Dorothy* 40l. whenever he should be thereunto requested. And the said *Dorothy* in fact says that the said payment of the said 400l., so as aforesaid made by the said *Dorothy* to the said commissioners for the advance of money at *Haberdashers' Hall* aforesaid, was a good and effectual payment within the intent of the said act of indemnity and oblivion, so that the said *Dorothy* upon the whole matter aforesaid ought to have an allowance of that payment upon a redemption to be made of the mortgage of the said tenements with the appurtenances; yet the said *Thomas* not regarding

his said promise and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Dorothy* in this behalf, has not paid or in anywise satisfied the said *Dorothy* the said 40l. or any penny thereof (although he to do this on the 20th day of *April* in the said 20th year and often afterwards, at *Westminster* aforesaid, was by the said *Dorothy* requested), but to pay the same to her has hitherto altogether refused and still refuses, nor has he in any manner allowed the said 400l., or any parcel thereof to the said *Dorothy* in the redemption of the mortgage of the said tenements, to the damage of the said *Dorothy* of 10l., and therefore he brings suit, &c.

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And the said *Thomas* by *William Callon* his attorney comes and defends the wrong and injury when, &c. and prays judgment of the said declaration, because he says that the said declaration and the matter in the same contained, are not sufficient in law to compel the said *Thomas* to answer the said declaration, to which the said *Thomas* has no necessity, nor is by the law of the land bound to answer. And this he is ready to verify; wherefore for want of a sufficient declaration in this behalf, the said *Thomas* prays judgment of the said declaration, and that the said declaration may be quashed, &c. Demurrer.

And the said *Dorothy* says, that by any thing by the said *Thomas* above in pleading alleged the declaration of the said *Dorothy* ought not to be quashed, because she says that the said declaration and the matters of the same contained, are good and sufficient in law to compel the said *Thomas* to answer the said declaration, which said declaration and the matter in the same contained, the said *Dorothy* is ready to verify and prove as the court, &c.; and because the said *Thomas* does not answer the said declaration, nor has hitherto in any wise denied the same, the said *Elizabeth* prays judgment and her damages on occasion of the premises to be adjudged to her, &c. And because the court of our lord the king here is not yet advised what judgment to give of and upon the premises, a day is given to the said parties before our lord the king at *Westminster*, until *Friday* next after three weeks of St. Joinder.

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St. Michael, to hear their judgment of and upon the premises, for that the court of our lord the king here is thereof not yet, &c.

- Case 44.

Wood *versus* Longuevill.

Trin. 22 Car. 2. Regis. Rot. 1555.

S. C. 2 Keb.
730. 740.

The payment of money due on a mortgage (the mortgagee being a pretended delinquent) into the treasury of a committee, which according to the rules of those times, had no power to receive it, adjudged a sufficient payment to discharge the mortgage of it by force of the act of pardon, 12 Car. 2. c. 11.

ASSUMPSIT by *Wood* plaintiff against *Longuevill* bart. defendant, on a case directed out of chancery, to be argued in this court on the matter of law, in which the case appeared to be this :

In the year 1637 one *Mitford* and *Elizabeth* his wife, being seised in right of the wife of two messuages, &c. in the town of *Newcastle-upon-Tyne*, by fine conveyed them to Sir *Andrew Young* knt. in fee, who afterwards by deed declared that it was only a mortgage to secure the payment of 400l. and interest. The 400l. not being paid, *Elizabeth* after the death of *Mitford* her husband for 700l. conveyed the tenements to the plaintiff in fee, though in truth the said *Elizabeth* had nothing but the equitable right of redemption, the mortgage being forfeited. In *April* 1643, the parliament at *Westminster* by an ordinance enacts, that the estates real and personal of all persons who had been, were, or should be in arms against the parliament, should be seised and sequestered into the hands of committees named in the said ordinance, who were commonly called the committee of advance and composition; and the said committees were empowered to sue for and recover all debts, sums of money and other duties, and to make acquittances, and this was afterwards enlarged and confirmed by ordinances and acts in the years 1646, 1649 and 1650. In *November* 1652, the parliament by a pretended act declared the said Sir *Andrew Young*, among others, to be a delinquent, and that all his lands, tenements and hereditaments, estates and interests whereof he was seised or possessed on the 20th day of *May* 1642, or ever since, should be vested and settled in certain trustees as a security for 60,000l. borrowed on the

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credit of the said act, to be sold to several persons in *London*, with a saving of the interest of all persons who should claim their interest before the committee of obstructions named in the said act. The plaintiff took notice of the act, and accordingly put in her claim to the said messuages, &c. Afterwards, on the 10th of *May* 1653, there was a pretended discovery of the said 400l. as a debt due to Sir *Andrew Young*, made to the committee for advance and compounding with delinquents sitting at *Haberdasher's Hall*, and the plaintiff was therefore summoned to pay in the 400l. to their treasury; on the 20th of *July* 1653, the said messuages were surveyed and returned to the said commissioners for sale as an estate in fee, and in the present possession of the commonwealth; on the 11th of *August* 1653, the plaintiff paid in the 400l. into the treasury of the said committee for advance; afterwards on the 24th of *August* 1653, *John Blunt*, under whom the defendant claimed, not knowing of the payment of the 400l. by the plaintiff to the committee of advance, contracted with the trustees for the purchase of the said messuages, &c., as an estate in fee of Sir *Andrew* in present possession, and in consideration of 605l. had a conveyance in fee enrolled from the said trustees; on the 30th of *November* 1659, on debate of the matter between the plaintiff and the said *Blunt* before the commissioners of obstructions, they declared the payment of the 400l. by the plaintiff to the commissioners for advance to be paid to a wrong hand, and ordered the possession of the said messuages to *Blunt* the purchaser. Afterwards in 1655, Sir *Andrew Young* by lease and release conveyed and released to *Blunt* his estate and interest; afterwards the plaintiff exhibited her bill in the exchequer to be relieved on payment of the 400l., but it was dismissed and she could not be relieved, and *Blunt* had verdicts at law, and recovered the possession; and afterwards since the king's restoration the plaintiff exhibited her bill in chancery, alleging that the payment of the 400l. to the commissioners of advance was now made good by the act of oblivion and indemnity in the 12th year of the now king *Charles* the second, in which there is a clause enacting, that no person or persons, who, by virtue of any order or warrant, mediately or immediately derived

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from his late majesty, or his majesty that now is, or by virtue of any act, ordinance, or order of any or both houses of parliament, or any of the authorities aforesaid, or any committee or committees acting under them or any of them, have seized, sequestered, levied, advanced, or paid to any public use, or into any public treasury within this kingdom, any goods, chattels, debts, rents, sum or sums of money, belonging to any person or persons whatsoever, shall hereafter be sued, molested, or drawn in question for the same, but that they and every of them shall be discharged against all persons, for so much and no more of the said goods, chattels, debts, rents, sum or sums of money, as their several and respective orders of discharge or acquittances extend unto. And whether upon the whole matter this payment by the plaintiff of the 400l. to the commissioners for advance, was a good payment within the intent of the said clause in the act of oblivion or not, was the question. And the plaintiff shewing the whole matter declared, that the defendant in consideration of 5l., promised to pay her 40l., if it was a good payment within the said clause, and then the plaintiff averred that it was a good payment within the said clause, and so demanded the 40l. and the defendant demurred to the declaration.

And it was argued in *Michaelmas* term last past, *Kelynge* chief justice then being absent, and the other three justices, namely, *Twyssden*, *Rainsford* and *Morton* were of opinion that it was a good payment; but they gave a day until this term, and now it was argued again, *Kelynge* chief justice being present; and the defendant took several exceptions. 1. That the plaintiff had not any acquittance or order of discharge, and so not within the clause, which discharges no more than what is comprehended in the acquittance or order of discharge; but it is here so far from a discharge, that the commissioners of obstructions have declared that the plaintiff ought not to be allowed it, because he had paid the money to a wrong hand. 2. That though it might be a good payment to discharge the plaintiff, yet it cannot be a good payment to charge the defendant; for now the plaintiff endeavours not only to discharge himself, but to charge the defendant by a mean to make him pay the 400l. to the plaintiff, namely, by

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an allowance of that money as part of the money to be paid by the plaintiff, for the redemption of the said messuages. 3. And principally, that though all the proceedings of the commissioners and houses of parliament were altogether illegal, yet they observed a rule and method among themselves; that the act of oblivion intended to ratify and discharge the parties who had yielded obedience to such proceedings; but the act of oblivion did not intend to make such payments good which were not good according to the rules of those times; and the plaintiff might have avoided the payment of the money to the committee of advance, if she had informed them, as the truth was and the plaintiff knew it to be so, that the estate was vested in the trustees for sale; and therefore the money ought to have been paid to the trustees and not to them; but the plaintiff in order to save the interest which was due for the 400l. voluntarily paid it to a wrong hand; and therefore there was no reason that the defendant should be damnified thereby. But notwithstanding these exceptions judgment was given for the plaintiff, that the payment was good, by the whole court without advice or deliberation. But it seems to me that it was a case of great nicety, and would have deserved greater consideration on the last point, if it had been a case which might often happen; but being a single case, which is never likely to happen again, it was not considered, nor very considerable.

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Poole *versus* Longuevill & al.'

Case 45.

Hil. 20 & 21 Car. 2. Regis. Rot. 1336.

ENGLAND, to wit. Our lord the king has sent to his right-trusty and well-beloved Sir *John Vaughan* knt., chief-justice of his bench, his writ close in these words, to wit: *Charles* the second by the grace of God, of *England, Scotland, France* and *Ireland* king, defender of the faith, &c. to our right-trusty and well-beloved Sir *John Vaughan* knt. our chief-justice of our bench, greeting: Because in the record and

Writ of error
from the com-
mon pleas to the
king's bench.

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proceedings, and also in the giving of judgment, in a plaint which was in our court before Sir *Orlando Bridgman* knt. and bart. and his companions our justices of the said bench, by our writ, between *Richard Poole* junior, and Sir *Thomas Longuevill* knt., *Anthony Middleton*, *William Purrott*, and *Thomas Leadall*, of the taking and unjustly detaining of the cattle of the said *Richard*, manifest error, as it is said, hath intervened, to the great damage of the said *Richard*, as by his complaint we are informed: We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you send to us distinctly and openly under your seal, the record and proceedings aforesaid, with all things concerning the same, and this writ; so that we may have them in 15 days from the day of *St. Martin*, wheresoever we shall then be in *England*, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of *England*, ought to be done. Witness ourself at *Westminster*, the 28th day of *October*, in the 20th year of our reign.

Chief justice's
return.

The answer of Sir *John Vaughan* knt. the chief justice within named.

The record and proceedings of the plaint, whereof mention is within made, with all things concerning the same, I send to our lord the king wheresoever &c. at the day and place within contained, in a certain record to this writ annexed, as within I am commanded.

John Vaughan.

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Pleas at *Westminster* before Sir *Orlando Bridgman* knt. and bart. and his companions justices of our lord the king of the bench, of *Michaelmas* term in the 19th year of the reign of our lord *Charles* the second, by the grace of God, of *England*, *Scotland*, *France* and *Ireland* king, defender of the faith, &c. Ro. 499.

Declaration in
replevin.

Yorkshire, to wit. Sir *Thomas Longuevill* knt., *Anthony Middleton*, *William Purrott*, and *Thomas Leadall*, were summoned to answer *Richard Poole* junior of a plea wherefore they took
the

the cattle of the said *Richard*, and unjustly detained them against gages and pledges, &c. And whereupon the said *Richard* by *William Battell* his attorney, complains that the said *Sir Thomas, Anthony, William* and *Thomas*, on the 27th day of *February* in the 18th year of the reign of our lord the now king, at *Burne*, in a certain place called *Parkes*, took the cattle, to wit, two geldings, three colts, one bull, three steers and five heifers of him the said *Richard*, and unjustly detained them against gages and pledges until &c. wherefore he says that he is injured and has damage to the value of 10l., and therefore he brings suit &c.

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And the said *Sir Thomas Longuevill, Anthony Middleton, William Purrott*, and *Thomas Leadall*, by *Christopher Hammond* their attorney, come and defend the wrong and injury when &c. And the said *Sir Thomas Longuevill* in his own right well avows, and the said *Anthony, William*, and *Thomas Leadall*, as bailiffs of the said *Sir Thomas Longuevill*, well acknowledge the taking of the said cattle in the said place in which &c. and justly &c., because they say that before the said time when the taking of the said cattle is above supposed to be made, and also at the said time when &c., the said *Sir Thomas Longuevill*, in right of *Mary* now his wife, was and yet is seised of and in a messuage, three barns, and three hundred acres of land with the appurtenances, situate, lying and being in *Burne* aforesaid, in the county aforesaid, whereof the said place called *Parkes* in which &c. is, and at the said time when &c. was parcel, in his demesne as of fee, (1) and the said *Sir Thomas Longuevill* being so as aforesaid seised of the said tenements with the appurtenances whereof &c., he the said *Sir Thomas Longuevill* afterwards, and before the said time when &c. to wit, on the last day of *March* in the 17th year of the reign of our said lord *Charles* the second now king of *England*, at *Burne* aforesaid, demised the said tenements with the appur-

Avowry and
cognizance for
rent arrears.

(1) This way of pleading the seisin of a husband in right of his wife, is held to be improper and bad on a special demurrer; the correct mode of pleading their seisin is to state, "that the

" said *Sir T. L. and M.* his wife were
" seised of and in, &c. in their de-
" mesne as of fee, in right of th^e said
" *Mary* " See vol. 1. 253. *Took v.*
" *Glascock*, note (4).

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tenances whereof &c. to one *Robert Burdax*, to have and to hold the said tenements with the appurtenances whereof &c. to the said *Robert* and his assigns, from the feast of the Annunciation of the blessed virgin *Mary* then last past unto the full end and term of one whole year from thence next following and fully to be compleat and ended; yielding and paying therefore for the said year to the said Sir *Thomas Longuevill* and his assigns, the rent of 78*l.* of lawful money of England, to be paid at the feast of St. *Michael* the Archangel, and the feast of the Annunciation of the blessed virgin *Mary* by even and equal portions; by virtue of which said demise the said *Robert Burdax* entered into the said tenements with the appurtenances whereof &c., and was possessed thereof, and held and enjoyed the said tenements until the 25th day of *March* in the 18th year of the reign of our said lord the now king, by virtue of the said demise; and because 39*l.* of the rent aforesaid above reserved, for the half of the said one year above granted ended on the feast of St. *Michael* the Archangel in the 17th year aforesaid, were, and still are, in arrear and unpaid to the said Sir *Thomas Longuevill*, wherefore the said Sir *Thomas Longuevill* in his own right, and the said *Anthony, William, and Thomas Leadall*, as servants of the said Sir *Thomas Longuevill*, and by his command, at the said time when &c. entered into the said place called the *Parkes* in which &c., being parcel of the said tenements with the appurtenances so as aforesaid demised to the said *Robert Burdax*, as in land liable (2) to and chargeable with

(2) A distress for rent must be made upon some part of the demised premises, otherwise the tenant may either rescue the distress, or bring an action of trespass. Co. Litt. 161. a. 2 Inst. 131. 1 Roll. Abr. 671. (M.) pl. 3. As where in trespass for entering the plaintiff's house and taking his goods, the defendant justified that he let the house to him for one term at a certain rent, and a stable to him for another term at a certain rent, and there being

rent in arrear on both demises, he distrained the goods *in the house* for the rent of *both* the premises; this justification was held ill on demurrer; for these being separate demises, there ought to have been *separate distresses on the several premises subject to the distinct rents*; and no distress on one part could be good for both rents. 2 Str. 1040. *Rogers v. Birkmire*. Cas. temp. Hardw. 245. S. C. But if the landlord, coming to distrain, sees the cattle on the demised premises,

with the distress of the said Sir *Thomas Longuevill*, and took and distrained the said cattle in the said declaration above mentioned, then being levant and couchant in and upon the said place called *Parkes*, in which &c. for the said rent being so as aforesaid in arrear to the said Sir *Thomas Longuevill*, as they lawfully might. And this they are ready to verify ; where-

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premises, and the tenant to prevent the distress, drives them from off the premises, the landlord may freshly follow and distrain them; but if the landlord did not see the catt'e on the premises, he cannot distrain them, though they were driven away on purpose to prevent his distress; nor can he distrain them if, after he has seen them, they go off the premises of their own accord. Co. Litt. 161. a. 2 Inst. 131. 1 Roll. Abr. 671. (M.) pl. 1, 2. But now by statute 8 Ann. c. 14. s. 2. extended, and enlarged by statute 11 Geo. 2. c. 19. s. 1, 2. it is enacted, that in case any tenant, lessee for life, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his goods or chattels, to prevent the landlord or lessor from distraining the same for arrears of rent so due, or made payable, it shall be lawful for every landlord or lessor, or any person by him for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for

the said arrears of rent, and the same to sell or otherwise dispose of in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, in and upon such premises for such arrears : provided that no landlord or lessor, or other person intitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold *bonâ fide* for a valuable consideration before such seizure made, to any person not privy to such fraud.

If the tenant fraudulently or clandestinely removes his goods from off the premises before any rent is due, though it be but the day before rent is due, it is considered not to be within the statute, which is held to apply only to the case where *rent is in arrear* at the time the goods are removed ; therefore the law seems to be defective in this respect. If a landlord distrain under this statute goods that have been fraudulently or clandestinely removed, and the tenant bring an action of trespass against him, he must plead specially that he made the distress by virtue of this statute, and cannot give it in evidence under the general issue ; so if the tenant bring replevin, the defendant must avow specially under the statute.

As to the *place* where a distress for rent may be taken, it is holden that it may

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wherefore they pray judgment and a return of the said cattle together with their damages, costs and charges by them about their suit expended, according to the form of the statute in such case lately made and provided, to be adjudged to them &c. (3). And

may be taken in a house, if the outer door is open. 1 Roll. Abr. 671. (M.) pl. 1. 5 Rep. 92. a. S. P. Or if a window is open, the landlord may enter into the house through it. 1 Roll. Abr. 671. (M.) pl. 2.; but the landlord cannot break open the outer door, or window, to distrain, though if the outer door is open, and he enters the house, he may break open an inner door. Comb. 17. Nor can the landlord enter into his tenant's barn, if it be locked; agreeable to which, Lord *Hardwicke* held that a padlock, put on a barn door, could not be opened by force to take corn in it as a distress. *Exeter summer assizes* 1735. 9 Vin. 128. pl. 6. But now by statute 11 Geo. 2. c. 19. s. 7. it is enacted, that where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant, lessee, his servant, agent, or other person aiding and assisting therein, shall be put, placed, or kept in any house, barn, stable, out-house, yard, close, or place locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for rent, it shall be lawful for the landlord, lessor, his steward, bailiff, receiver, or other person empowered to take and seize as a distress for rent such goods and chattels, (first calling to his assistance the constable, headborough, borsholder, or other peace-officer of the hundred, borough, parish, district, or

place where the same shall be suspected to be concealed, and in case of a dwelling-house, oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods and chattels are therein), in the day time to break open and enter into such house, barn, stable, outhouse, yard, close and place, and to take and seize such goods and chattels for the arrears of rent, as he might have done by virtue of that or any former act, if such goods and chattels had been put in any open field or place.

With regard to the *time* of making the distress, it seems settled that the landlord cannot distrain for rent on the day in which it is reserved and made payable, for it is not due until the last minute of that day. 1 Saund. 287. *Duppa v. Mayo*, per Hale chief baron. 10 Rep. 127. b. *Clun's* case; and the landlord could not at the common law have distrained after the term was expired, but was obliged to have recourse to an action of debt to recover his rent; and therefore if a lease was made for a year, reserving rent payable at *Lady* day and *Michaelmas*, the landlord could not distrain for the rent due at *Michaelmas*, because, having no power to distrain until the day after, he was then too late, for the term was expired. Doct. & Stu. Dial. 2. c. 9. Bro. *Distress* 19. Co. Litt. 47. b. 1 Roll. Abr. 672. pl. 8. And it was the same thing, though the lessee

And the said *Richard Poole* says, that the said *Sir Thomas Longuevill* for the reason above alleged, ought not to avow, nor the said *Anthony, William, and Thomas Leadall*, as bailiffs of the said *Sir Thomas Longuevill*, to acknowledge the taking of the said cattle in the said place in which to be just &c., because he says, that he the said *Richard Poole* at the said time

when,

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Plea in bar.

That the cattle
escaped into the
locus in quo, &c.
through the de-
fect of the
fences, which

lessee held over by sufferance or wrong after the expiration of his term, for he was not in possession *in privity of the lease*. 1 Roll Abr. 672. pl. 10. *Harrison v. Metcalf*. Cro. Jac. 442. S. C. 2 Bac. Abr. 107; and the case in Keilw. 96. a. pl. 5. to the contrary, being cited in *Harrison v. Metcalf*, was over-ruled. However, though the term for which the land is *expressly* demised expires, yet if the tenant is intitled, by the custom of the country, to the corn which he has sown on a part of the land, generally called an off-going crop, and to deposit it, when reaped, on the premises until a certain time, this custom is held to amount to an implied agreement between the parties, that the relation of landlord and tenant, or in other words, the term shall continue, as to that part of the premises, until the time limited by the custom is determined, and consequently the landlord may within that time distrain the corn for rent due at the expiration of the term for which the whole estate was demised. 1 H. Black. 5. *Beavan v. Delahay*. But now by statute 8 Ann. c. 14. s. 6, 7. reciting that tenants *pur auter vie*, and lessees for years or at will, frequently hold over the tenements to them demised, after the determination of such leases, and that after the determination of such, or any other leases, no distress can by law

be made for any arrears of rent that grew due on such respective leases before the determination thereof, it is enacted, that it shall be lawful for any person having any rent in arrear, or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined: provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due. If the distress be replevied, or trespass brought, the defendant in his avowry or plea must shew specially that he took the distress by virtue of this statute.

(3) There was a considerable degree of nicety and difficulty in an avowry or cognisance for rent at the common law, from which the plaintiff the tenant, against the merits of the case, often derived great advantage, by traversing some part of the title stated therein, and thereby putting the defendant under the necessity of proving it at the trial. It was necessary in the avowry or cognisance to shew, that
the

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the tenant was bound to repair, and before plaintiff had notice of the escape, the defendant distrained them

when, &c. and long before was possessed of and in a close of pasture in *Burne* aforesaid, adjoining next and contiguous to the said place called *Parkes* in which, &c.; and the said *Richard Poole* further says, that the said *Sir Thomas Longuevill*, and all those whose estate the said *Sir Thomas* now hath, and at the said time when, &c. had, of and in the said close called *Parkes*,

the defendant, or some person from whom the reversion came to him, was seised, and the quantity of estate which he was seised of, and that he made a lease to the plaintiff for life, or years, or at will, and the descent or grant of the reversion to the defendant. Lib. Plac. 264. Clift. 640. Post. 310. So, if tenant for years had letten the estate to another for a less term at a certain rent, and distrained for the rent, it was incumbent on him in his avowry to shew the commencement of his estate, by laying the fee in some person who granted the term, and then deducing the title to it down to himself from the grantee of the term; which was often a difficult and impracticable thing to be done, especially in long terms for years, which are generally assigned to a great number of persons. 2 Salk. 562. *Scilly v. Dally*. S. C. Carth. 444. Comb. 476. 1 L.d. Raym. 331. 1 Bro. P. C. 74. And for the same reason an avowry for rent stating that A. *habens titulum* demised to the plaintiff, and that he made an under-lease to the plaintiff, was held bad on demurrer. 2 Str. 796. *Reynolds v. Thorpe*. But now with respect to avowries and cognisances for rent, it is enacted by statute 11 Geo. 2. c. 19. s. 22. that it shall be lawful for all defendants in replevin to avow or make cognisance generally, that the

plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due, without further setting forth the grant, demise or title of such landlord or lessor; and if the plaintiff shall become nonsuit, discontinue, or have judgment against him, the defendant shall recover double costs. It is held that a plea in bar of *de injuriâ suâ propriâ absque tali causâ*, to an avowry or cognisance under this statute is bad and demurrable to; but the plaintiff must traverse some particular obligation in the avowry. 1 Bos. & Pull. 76. *Jones v. Kitchen*. Avowries and cognisances for distresses damage-feasant are not within this statute, and therefore they remain as they were. However in the case of distresses for rent, it may sometimes be proper to draw an avowry at common law, and not under the statute; as where the parties agree to distrain in order to try the title to an estate in an action of replevin; there, it may perhaps be the better way for the avowant to set forth his title specially in his avowry to give the plaintiff an opportunity of traversing it, and so go to trial upon some particular point in issue.

Parkes in which, &c. from time whereof the memory of man is not to the contrary, have made and repaired, and have been used and accustomed to make and repair, the hedges and fences between the said close called *Parkes* in which, &c. and the said close of pasture of the said *Richard*; and the said *Richard* says that before the said time when, &c. and also at the said time when, &c. the hedges and fences between the said close in which, &c. and the said close of pasture of him the said *Richard Poole*, were broken, open, and in decay through the want of the repairing thereof; wherefore the cattle of the said *Richard*, being before then put into the said close of pasture of him the said *Richard*, afterwards and before the said time when, &c. to wit, on the said 27th day of *February* in the 18th year aforesaid, escaped out of the said close of pasture of the said *Richard*, and through the defect of the said hedges and fences entered into the said close in which, &c. and remained there until the said *Sir Thomas*

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The difficulty of deducing the title from tenant in fee-simple down to the termor for years, it is presumed, gave birth to a late attempt to overturn this established rule of pleading, which Lord *Holt*, in the beforementioned case of *Scilly v. Dally*, calls a *fundamental rule, which ought not to be broken upon fancied inconveniences*, by comparing the declaration in replevin to what it is nothing like, namely, to an action of trespass for taking goods, and, instead of avowing and praying a return of the cattle, pleading a plea of justification, that the defendant took them damage-feasant beginning and concluding in bar; and as the defendant to an action of trespass for taking cattle may plead generally that he *was possessed* of a close, and took the cattle damage-feasant, so it was contended, the defendant might do in a plea to a declaration in replevin justifying taking

damage-feasant. But the Court of Common Pleas put an effectual stop, it is to be hoped, to this innovation, by determining that such a plea could not be supported, but militated against an established rule of pleading. The case alluded to was, where in replevin the defendant pleaded by way of justification, beginning in the form of a plea, that before and at the said time when, &c. he was *possessed* of a messuage with the appurtenances, and being so possessed *was lawfully entitled to common* of pasture in the said place in which, &c. and distrained as a commoner the cattle damage-feasant, and concluded by *praying judgment si actio*: &c., and on demurrer the court stopped the counsel who was to have argued against the validity of the plea, being clearly of opinion that the plea could not be supported, and gave the defendant leave to amend. 2 Bos. & Pull. 359. *Hawkins v. Eckles*.

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Longuevill, Anthony, William and Thomas afterwards, and before he the said *Richard Poole* had or could have any notice (4) that the cattle were in the said place in which, &c. to wit, at the said time when, &c. took the said cattle in the said place in which, &c. and unjustly detained them against gages and pledges in manner and form as the said *Richard* above thereof complains against them. And this he is ready to verify; wherefore, inasmuch as the said *Sir Thomas, Anthony, William and Thomas* have above acknowledged the taking and detaining of the said cattle, he the said *Richard Poole* prays judgment and his damages on occasion of the taking and unjust detaining of the said cattle to be adjudged to him, &c.

(4) It seems that, though where cattle escape into the land of another through the defect of fences, which the tenant of the land is bound to repair, no action will lie against the owner of the cattle for this damage, nor is it lawful to distrain them, because it was the tenant's own fault that he did not repair his fences; yet if the tenant gives the owner of the cattle notice that they are upon his land, and the owner of the cattle suffers them to continue there after such notice, they are then trespassers, and may be distrained for the damage done after the notice, or an action of trespass may be brought against the owner of the cattle for such damage; and the tenant may state that fact in his replication by way of new assignment, to a plea of escape through the insufficiency of fences, in case he brings trespass for the damage done by the cattle after notice; or he may reply such fact to a similar plea in bar, in case he distrains for such damage, and the owner of the cattle brings replevin against him. This seems to be warranted by the 22 Edw. 4. 50. a. where it is said by *Choke* justice, that if cattle

escape into the close of another who is bound to inclose, and notice is given to the owner of the cattle that they are in the close, but he permits them to continue there after notice, it is lawful for the occupier of the close to distrain; for if the owner of the cattle will not drive them out of the close after notice, it seems they may be distrained damage-feasant. This case is cited in 2 Leon. 93. *Edwards v. Halinder*, in which it is said, that where I am bound to inclose my land against another, and in default of inclosure the cattle of the other escape into my land, I shall not punish him; but if he after notice doth suffer them to continue there, he shall be punished, although it be through my default. It is also recognized by *Powell* justice, in 2 Lntw. 1578, 1579. *Kimp v. Cruwes*; and Lord Chief Baron *Comyns* says, that it is no plea for the defendant to say that the plaintiff ought to repair the fences, and the cattle escaped through the defect of them, if he suffers his cattle to continue there after notice, though the fences are not in repair, Com. Dig. *Pleader*, (3 M 29)

And

And the said Sir *Thomas, Anthony, William and Thomas* say, that the said plea of the said *Richard* above pleaded in bar of the said avowry and cognisance, and the matter in the same contained, are not sufficient in law to bar them the said Sir *Thomas, Anthony, William and Thomas* from avowing and acknowledging the taking of the said cattle in the said place in which to be just, &c., and that they have no necessity, nor are bound by the law of the land to answer the said plea in manner and form aforesaid pleaded. And this they are ready to verify; wherefore for want of a sufficient plea of the said *Richard* in this behalf they the said Sir *Thomas, Anthony, William and Thomas* pray judgment, and a return of the said cattle, together with their damages, &c. (as in the avowry) to be adjudged to them, &c.

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Demurrer.

And the said *Richard*, inasmuch as he has above alleged sufficient matter in law for him the said *Richard* to have his said action maintained against the said Sir *Thomas, Anthony, William and Thomas*, which he is ready to verify; which said matter the said Sir *Thomas, Anthony, William and Thomas* do not deny nor in anywise answer the same, but altogether refuse to admit such verification, as before, prays judgment and his damages on occasion of the taking and unjust detaining of the said cattle to be adjudged to him, &c. And because the justices here will advise of and upon the premises before they give judgment thereon, a day is given to the said parties here until the octave of St. *Hilary* to hear their judgment thereon, for that the said justices here are thereof not yet advised, &c. At which day here come as well the said *Richard* as the said Sir *Thomas, Anthony, William and Thomas* by their said attornies, and because the justices here will further advise of and upon the premises before they give judgment thereon, a further day is given to the said parties here until 15 days from the day of *Easter* to hear their judgment thereon, for that the said justices here are thereof not yet, &c. At which day here come as well the said *Richard* as the said Sir *Thomas, Anthony, William and Thomas* by their said attornies, and because the justices here will further advise of and upon the premises before they give judgment thereon, a further day is given to the said parties here until the morrow of the Holy *Trinity* to hear their judgment

Joinder.

Continuances.

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Judgment for
the defendants.

Writ of inquiry
awarded under
the stat. 17
Car. 2. c. 7.

judgment thereon, for that the said justices here are thereof not yet advised, &c. At which day here come as well the said *Richard* as the said *Sir Thomas, Anthony, William* and *Thomas* by their said attornies, and thereupon the premises being seen, and by the justices here fully understood, it seems to the said justices here that the said plea of the said *Richard* above pleaded in bar of the said avowry and cognisance, and the matter in the same contained, are not sufficient in law to bar the said *Sir Thomas, Anthony, William* and *Thomas* from avowing and acknowleging the taking of the said cattle in the said place in which, &c. to be just, as the said *Sir Thomas, Anthony, William* and *Thomas* have above alleged. Therefore it is considered that the said *Richard Poole* take nothing by his writ, but be in mercy for his false claim; and that the said *Sir Thomas Longuevill, Anthony Middleton, William Purratt, and Thomas Leadall* go thereof without day, &c. And thereupon the said *Sir Thomas, Anthony, William* and *Thomas*, according to the form of the statute in such case lately made and provided, pray the writ of our lord the king to be directed to the sheriff of the said county to inquire of the sum in arrear (5) of the rent aforesaid at the time of taking the said cattle,

(5) It does not seem necessary to inquire of *the sum in arrear*, where judgment is given upon demurrer for the avowant, or person making cognisance, but only of the value of the distress, according to the entry in 1 Saund. 195. *Mounson v. Redshaw*; for by the statute 17 Car. 2. c. 7. s. 2. if judgment be given on demurrer for the avowant, or person making cognisance, the court shall award a writ to inquire of the *value of the distress* (without mentioning any thing of the arrears) and upon the return thereof, judgment shall be given for the arrears alleged to be due in such avowry, if the distress amount to that value, and if not, then for the value of

the distress: but by the 2d section of the statute, if the plaintiff shall be nonsuit before issue joined, the defendant making a suggestion in the nature of an avowry or cognizance for rent, to ascertain to the court the cause of the distress, the court shall award a writ to inquire touching *the sum in arrear, and the value of the distress*. Therefore in the case of a nonsuit before issue joined, it is necessary that the writ of inquiry should be as well of the amount of the rent in arrear, as of the value of the distress, but not in the case of judgment for the avowant on demurrer. See 1 Saund. 195. note (3). And the reason of the difference seems to be, because the

cattle, and of the value of the said cattle; therefore the sheriff is commanded that by the oath of good and lawful men of his bailiwick, he diligently inquire what sums of money of the said rent were in arrear to the said Sir *Thomas Longuevill* at the time of the taking of the said cattle, and how much the said cattle were then worth according to their true value, and the inquisition which he shall thereupon take, let the sheriff make appear here in three weeks of St. *Michael*, under his seal and the seals, &c. At which day here come the said Sir *Thomas, Anthony, William* and *Thomas*, by their attorney aforesaid, and the sheriff, to wit, Sir *Richard Mauleverer* knt. and baron^t, now sends here a certain inquisition taken before him at the castle of *York* in the said county, on the 6th day of *August* last past, by the oath of 12 good and lawful men, &c. by which it is found that the said sums of money of the said rent being in arrear to the said Sir *Thomas Longuevill* at the time of the taking of the said cattle were 39l; and the said cattle were worth according to the true value thereof 38l. Therefore it is considered that the said Sir *Thomas, Anthony, William* and *Thomas* do recover against the said *Richard Poole* the said 38l. for the value of the said cattle parcel of the said rent being in arrear as aforesaid, by the said inquisition in form aforesaid found, and their damages on occasion of the premises to 10l. by the court here adjudged by the discretion of the justices here to the said Sir *Thomas, Anthony, William* and *Thomas*, at their request, for their costs

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Inquisition re-
turned by the
sheriff.

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Judgment for
the defendant.

the demurrer admits the amount of the rent to be as alleged in the avowry, but does not admit the value of the distress, for that is not alleged; but a nonsuit before issue, though after an avowry, admits nothing; and therefore the defendant is bound to prove, as well the amount of the rent, as the value of the distress. Although the statute is general, "that where the plaintiff is nonsuit before issue joined, the defendant making a suggestion in the nature of an

"avowry, &c." yet if the plaintiff should be non-prossed after the defendant has avowed, for want of a plea in bar, it does not appear to be necessary in that case to make any suggestion; for the cause of the distress being already ascertained, which seems to be all that is required by the statute, it would be superfluous to add a suggestion of that which sufficiently appears before. See Tidd's Prac. Forms, 163, 164.

• and

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Assignment of
errors.

General errors.

(b) But see
Carrh. 253.
Baker v. Lade,
2 Wils. 116.
Cooper v. Sher-
broke, 1 Saund.
195. d. con-
tinuation of
note (3).

Award of scire
facias to hear
errors.

Viccomes non
missis breve
alias sci. fac.

and charges by them in that behalf sustained, according to the form of the statute thereof lately made and provided; which said value, costs and charges in the whole amount to 48l.

Afterwards, to wit, on *Saturday* next after the octave of *St. Hilary* in this same term, before our lord the king at *Westminster*, comes the said *Richard Poole* by *Richard Aston* his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said *Sir Thomas Longuevill, Anthony Middleton, William Purrott* and *Thomas Leadall* against the said *Richard Poole*, whereas by the law of the land, the said judgment ought to have been given for the said *Richard Poole*, against the said *Sir Thomas Longuevill, Anthony Middleton, William Purrott* and *Thomas Leadall*; therefore in that there is manifest error: there is also error in this, that the avowry and cognisance aforesaid, and the matter in the same contained are not sufficient in law for the said *Sir Thomas Longuevill, Anthony Middleton, William Purrott* and *Thomas Leadall* to maintain the said avowry and cognisance; therefore in that there is manifest error: there is also error in this, that the said *Sir Thomas Longuevill, Anthony Middleton, William Purrott*, and *Thomas Leadall* prayed a writ to have a return (b) of the said cattle, and afterwards had a writ to enquire of the value of the said cattle; therefore in that there is manifest error: and the said *Richard Poole* prays the writ of our said lord the king to give notice to the said *Sir Thomas Longuevill, Anthony, William* and *Thomas Leadall*, that they be before our said lord the king to hear the records and proceedings aforesaid, and it is granted to him, &c. Whereupon the said sheriff is commanded that by good and lawful men of his bailiwick, he give notice to the said *Sir Thomas Longuevill, Anthony, William* and *Thomas Leadall*, that they may be before our lord the king in 15 days of *Easter* wheresoever, &c. to hear the record and proceedings aforesaid, and further, &c. the same day is given to the said *Richard Poole*; at which day, before our lord the king at *Westminster*, comes the said *Richard Poole* by his attorney, and the sheriff has not returned his writ; therefore, as before,

the

the sheriff is commanded that by good, &c. he give notice to the said Sir *Thomas Longuevill, Anthony, William and Thomas Leadall*, that they be before our lord the king on the morrow of the Ascension of our Lord wheresoever, &c. to hear the record and proceedings aforesaid, and further, &c. the same day is given to the said *Richard Poole*; and thereupon the said Sir *Thomas Longuevill, Anthony Middleton, William Purrott and Thomas Leadall*, freely come here into court by *William Cullow* their attorney, and say, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray that the court of our said lord the king now here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid may be in all things affirmed. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the said parties before our lord the king at *Westminster* until the morrow of the *Holy Trinity* (and so it is continued unto Hil. 22 & 23.) At which day before our lord the king at *Westminster* come the parties aforesaid by their attornies aforesaid, whereupon all and singular the premises, as well the record and proceedings aforesaid, and the judgment given thereupon, as the causes and matters aforesaid by the said *Richard* above assigned for errors, being seen and by the court of our lord the king now here more fully understood, and diligently examined and inspected, it appears to the court of our said lord the king now here, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; therefore it is considered that the said judgment be in all things affirmed, and stand in full force and effect, the several causes and matters above for error assigned in anywise notwithstanding: and it is further considered by the court of our said lord the king here, that the said Sir *Thomas Longuevill, Anthony, William and Thomas Leadall* do recover against the said *Richard Poole* six pounds adjudged to them the said Sir *Thomas, Anthony, William and Thomas* by the court of our said lord the king now here, according to the form of the statute in such case made and provided, for their damages, costs and charges

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In nullo est erratum.

Curia advisare vult.

Judgment affirmed.

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which they have sustained by reason of the delay of execution of the judgment aforesaid, on pretence of the prosecution of the said writ of error; and that the said Sir *Thomas, Anthony, William and Thomas* have execution thereof, &c.

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Hil. 20 & 21 Car. 2. Regis.

S. C. 2 Keb.
660. 680. 729.
If cattle escape
out of an ad-
joining close,
and are levant
and couchant,
adjudged that
they may be
distrained for
rent, though
they escape
through the de-
fect of fences
which the party
distraining ought
to have repaired:
but see post.
note (7).

ERROR on a judgment in replevin in the common bench, where *Poole* was plaintiff against *Longuevill* and others defendants, and declared that the defendants had taken his cattle in a place called *Parkes*, in *Burne* in the county of *York*. The defendants avow the taking in the place in which &c., for rent arrear reserved on a lease for years made by *Longuevill* and his wife, in whose right he was seised in fee, to one *Burdax*. The plaintiff pleads in bar to the avowry, that he himself was possessed of a close next adjoining to the said place in which &c., and that the defendant *Longuevill* and all those whose estate &c., from time whereof &c., have made and been used to make the fences between the said place &c., and the plaintiff's close, and that the fences were not repaired, whereby the plaintiff's cattle escaped through the defect of the fences out of the said close of the plaintiff into the said place in which &c., and that the defendants took them before the plaintiff had any notice of their being in the said place in which &c., and this &c., wherefore &c., upon which the defendants demurred in law, and judgment was given in the common bench for the defendants, that the plaintiff's plea in bar was not good; upon which the plaintiff brings a writ of error into this court.

And the matter of law was argued in *Trinity* term last past by *Levinz* of *Gray's Inn* for the plaintiff, that the judgment was erroneous, and that the cattle could not be distrained, because they escaped through the defect of fences, which was a fault in the defendant *Longuevill* himself, who ought to have

have repaired them as appears on the record; but the judgment was affirmed *nisi* &c. And the court relied much on the case of 10 H. 7. 21. b. where it is said, that if cattle escape into any land, and the lord distrain them, the distress is good, and that it is not material whether they are levant and couchant or not.

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And afterwards *Levinz* moved that there was an error in the judgment, for the words "therefore it is considered that the said *Richard Poole* take nothing by his writ, but be in mercy for his false claim, and the said Sir *Thomas Longueville*, *Anthony Middleton*, *William Purrott* and *Thomas Leadall* (all the defendants) go thereof without day," were wholly omitted out of the record, wherefore the affirmance of the judgment was staid until this term; and now it was moved again, the record being amended, and the said words inserted, and thereupon the judgment was affirmed absolutely.

Record amended after error brought, and the record in the court of error.

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Note. It seems to me, that this case is hard to be maintained; for there is a vast difference between a lord distraining within his seignory, and a landlord distraining for rent reserved on his own lease; for the lord has nothing to do with the land or the fences, and therefore it is not material to him whether the fences are repaired or not; but it is otherwise of a landlord, for he himself ought to repair or to provide that his tenant repairs them, else he would take advantage of his own wrong, which would be inconvenient. And this diversity seems to be warranted by the books, Dy. 317, 318. (6) 22 Edw. 4. 49. b. 7 H. 7. 1. 10 H. 7. 21. 15 H. 7. 17. But

(6) The case in *Dyer* is this: Two men being severally seised of two closes adjoining together, and the inclosure and fence between the closes belonging to one of them by prescription, the cattle of the other escaped out of one close into another through the defect of the fence, and immediately before the owner of the cattle could drive them out into his own close, the lord distrains them for services, and whether he could

do so was the question on demurrer. But the case was, that the distress was taken by a lessor for rent reserved on a lease for years, and not by a lord for his services, and therefore it was adjudged for the plaintiff and against the avowant; for no fault can be assigned in the owner of the cattle for this escape, nor does any law oblige him to keep his cattle in his own close.

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if the cattle escaped into the land without any default of the fences, or where the tenant of the land, in which they are distrained, is not bound to repair the fences through the defect of which the cattle escape and are distrained, it is immaterial to the lord or landlord whether they are levant or couchant or not (7).

(7) And agreeable to the opinion of *Saunders*, the settled distinction seems now to be, that where a stranger's cattle escape into another's land by breaking the fences where there is no defect in them, or if the tenant of the land where the distress is taken is not bound to repair the fences, though there is a defect in them, the cattle may be distrained for rent immediately before they are levant and couchant; but if the cattle escape through the defect of fences which the tenant of the land is bound to repair, they cannot be distrained by the landlord for rent, though they have been levant and couchant, unless the owner of the cattle, after notice that they are in the land, neglects or refuses to drive them away, for the landlord shall not take advantage of his own wrong; and this case of *Poole v. Longuevill* is denied to be law. But the lord, or grantee of a rent-charge, who have nothing to do with the fences, may in such case distrain the cattle after they have been levant and couchant, though

no notice is given to the owner; because there being no default in them as there is in a landlord, such notice is not necessary. 2 Lutw. 1580. *Kemp v. Cruvers*. Gilb. Dist. 34. 2d edit.

It was held that cattle going to *London*, and put into a close with the consent of the landlord and leave of the tenant to graze for a night, might be distrained by the landlord for rent. 3 Lev. 260. *Fowkes v. Joyce*. S. C. 2 Vent. 50. 2 Lutw. 1161. but the owner of the cattle was afterwards relieved in equity on the ground of fraud in the landlord, who had consented to the cattle being put into the close, and afterwards distrained them for rent, and he was decreed to pay all the costs both of law and equity. And it should seem that at this day a court of law would be of opinion, that cattle belonging to a drover being put into a ground with the consent of the occupier to graze only one night, in their way to a fair or market, were not liable to the distress of the landlord for rent.

Dakin's Case.

Case 46.

No. 26. Surr. *Inter recorda regis.*

DAKIN was fined 22l. in the court-leet of the mayor, commonalty and citizens of *London* of their manor, called the king's manor, in the borough of *Southwark* in the county of *Surry*, for refusing in open court to take upon him the office of constable within the said manor; and the presentment and record of the fine was certified into this court by a *certiorari* in this manner, to wit, "View of frank pledge of the mayor, commonalty, and citizens of the city of *London*, lords of the said manor, holden for the said manor, at a certain place called the court-house on *St. Margaret's Hill*, in the town and borough aforesaid, within a month after the feast of *St. Michael* the Archangel, to wit, on Tuesday the 12th day of November in the 21st year of the reign of our lord *Charles* the second now king of *England* &c., before *Edward Smith* esq. steward, &c."

S. C. 1 Vent.

107.

2 Keb. 731.

If what comes under a *scilicet* be contrary to the preceding matter it is void.

A certain day, when a court-leet was holden, must be shewn in the caption of a presentment at it.

And *Saunders* moved to quash this presentment, because it appears that the court was held after a month after *Michaelmas*, namely, on the 12th day of *November*, which was more than a month after *Michaelmas*; for *Michaelmas* is always on the 29th day of *September*, and therefore it was void and the presentment also. But to this it was answered, that this presentment alleges that the court was held *within a month after the feast of St. Michael*, and the *scilicet*, that it was held on the 12th day of *November*, being contrary to the precedent matter, is void; *quod fuit concessum* (1).

(1) So where in ejectment the *demise* was the *second* of *January*, and the defendant afterwards, *to wit*, on the *first* of *January* ejected him, the *scilicet* was rejected as expressly contrary to

the word *afterwards* and the *precedent matter*. Cro. Jac. 96. *Adams v. Goose*. 1 Salk. 325. *Wyat v. Aland*. So where in trover the declaration stated that the plaintiff on the *third* of *May* was possessed

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(b) S. P. Hawk.
P. C. 56. fee
9. fol. edit.

But then it was moved that the *scilicet* being void, here appears no day at all when the court was held; and there ought to be a certain day shewn when the court was held, and it is not sufficient to say that the court was held within a month after *Michaelmas* generally, for perhaps it was held on a *Sunday* (b) which is a *dies non juridicus*, and so void; and therefore a certain day ought to appear on the record; and for

fessed of certain goods which, on the fourth of *May*, came to the defendant's hands, who afterwards, *to wit*, on the first of *May* converted them, it was adjudged that the *scilicet* should be rejected as surplusage and void, the words "*afterwards converted*," being of themselves a sufficient allegation of a subsequent conversion. Cro. Jac. 428. *Tesmond v. Johnson* So where in debt for rent the plaintiff declared that J. S., on the 20th of *November* in such a year, made a lease to the defendant, and devised the reversion to the plaintiff, and afterwards, *to wit*, on the 6th of *November* in the same year died, so that his death appeared to have been before the lease, the *scilicet* was held repugnant to the precedent matter and void. Hard. 4. *Jones v. Williams*. So where one covenanted to pay another 83l. every year quarterly, *to wit*, 20l. 15s. at *Michaelmas*, 20l. at *Lady day*, 20l. 15s. at *Midsummer*, and 20l. 15s. at *Christmas*, which together did not amount to 83l.: it was objected, that without the particular sums under the *scilicet*, it did not appear how much was to be paid at one day, and how much at another, or which were the quarter days on which the money was payable; and the word *quarterly* did not supply

this uncertainty, for it was not said quarterly by *equal portions*; but it was answered and resolved by the court, that the word *quarterly* supplied the whole, and the variance under the *scilicet* did not hurt, for by the word *quarterly* should be understood as well the usual quarter days, as payment by *equal portions*. 2 Lev. 99. *Vanaston v. Mackarly*. So where the defendant in replevin made cognizance for two years and a quarter's rent in arrear; and alleged that for a long time, *to wit*, for two years and a quarter ending at *Christmas* 1803, the plaintiff held and enjoyed the premises as tenant thereof to A. B. by virtue of a certain demise, &c. to which the plaintiff pleaded in bar, that he did not hold and enjoy the premises as tenant thereof to A. B. by virtue of the said demise *modo et formâ*: it was holden to be sufficient to entitle the defendant to a verdict if he prove that the plaintiff held of A. B. from the 23d of *December* 1801, and to recover for two years rent. 6 East, 434. *Forty v. Imber*. The same proposition, namely, that if what comes under a *videlicet* or *scilicet* be impossible, or contrary or repugnant to the preceding matter, or the plaintiff's title, it shall be rejected as surplusage and void, is supported by a great

for this cause the presentment was quashed by the whole court. See the statutes of Magna Charta, c. 35. 31 Edw. 2. c. 15. Bro. Leite 32. that a leet cannot be held at any other time but within a month after *Easter* and *Michaelmas*, unless it be by patent or special prescription, which do not appear in this case.

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a great number of other authorities. ~~Cro. Jac. 133. Officium v. Martin. Ibid.~~
154. *Brigate v. Short*. Ibid. 662. ~~Rut-~~
~~man Mills~~. Latch. 200, 201. *Harvey*
v. Reynolds. Ibid. 209. *Alcock v Blofield*.
All. 23. *Sims v. Gregory*. 2 Str. 1095.
Webb v Turner. 12 Mod. 579. *Johnson v.*
Meers. 1 Black. Rep. 495, 496. *Bishop*
of Lincoln v. Wolferston. See 1 Saund.
118, 119. *Cutler v. Southern*, and note
(8) Ibid. 287. *Duppa v. Mayo*.

But a *videlicet* or *scilicet* is not always mere surplusage, and cannot be rejected as such. For where an allegation is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, though laid under a *videlicet*, and however inconsistent with a subsequent allegation, it cannot be rejected as surplusage. 5 East, 244. *The King v. Stevens*. It is also sometimes used to explain what goes before it; and if the explanation be consistent with the preceding matter, it is traversable; as where a seisin is alleged to be in another in fee-tail, *to wit*, to him and the heirs males of his body, this is an estate in tail-male, and that which follows the *videlicet*, being not contradictory to, but consistent with, what precedes it, is material, and therefore may be traversed and must be proved. For the natural and proper use of a *videlicet*, says Lord Hobart, is to particularize

that which is general before, and to explain that which is indifferent, doubtful or obscure; but it must neither be contrary to the premises, nor increase nor diminish the precedent matter; and therefore if a man seised in fee of black-acre, white-acre and green-acre in D., should grant all his lands in D., *that is to say*, black-acre and white-acre, yet green-acre shall also pass by the grant; but if lands lying out of D. are added under the *scilicet*, they will not pass. So a *videlicet* may sometimes restrain the generality of the former words, where they are not express and special, but stand indifferent so as to be capable of being restrained without apparent injury to them; as if lands be granted to a man and his heirs, *that is to say*, the heirs of his body, it is an estate-tail. Hob. 175. *Stukely v. Butler*.

So where a *videlicet* contains that which is material and necessary to be alleged, it is considered as a direct and positive affirmation or averment, which is material and traversable. 1 Str. 233: *Hayman v. Rogers*. As if the condition of a bond is to perform the award of J. S. to be made and delivered on or before the 24th of May, and no award is pleaded, and the plaintiff replies, that after the making of the bond and before the commencement of the action, *to wit*, on the 21st day of May, the arbitrator

arbitrator made his award, here the *scilicet* is a positive averment that the award was made within the time limited by the condition, and may therefore be traversed and issue taken upon it. 3 Burr. 1729. *Biffex v. Biffex*. S. P. 1 Sound. 169, 170. *Skinner v. Andrews*, and note 2. So where in debt on bond for 781l. 14s. conditioned for the payment of 319l. 17s. the defendant pleaded that he was indebted unto the plaintiff in a large sum of money, *to wit, the said sum of money in the said condition mentioned*, it was objected on demurrer, that this coming under a *videlicet* was not directly alleged, and therefore not traversable; but by the court, *the office of a videlicet is to explain what went before, and where it is not repugnant or contradictory, it is material and traversable*, and the plea was held good. 2 Willf 332. 335. *Knight v. Preston*. So where in debt on bond for 1400l. conditioned for the payment of 700l, the defendant pleaded that there was due from him to the plaintiff on the bond a much less sum than 1400l *to wit, the sum of 735l.* and no more, and that the plaintiff was indebted to him in a larger sum of money; the plaintiff replied that there was due on the bond more than 751, namely 835l concluding to the country; and on a special demurrer it was objected, that the defendant, having pleaded the sum of 735l. under a *videlicet*, was not bound to prove that specific sum, but might prove a greater or less sum, and therefore that averment was not traversable; but it was adjudged that when an averment is material the addition of a *videlicet* does not render it immaterial but it is as much traversable as if the *videlicet* had

not been inserted. 6 Term Rep. 469. *Grimwood v. Barrit*.

And as such an averment or affirmation coming after a *videlicet* is *traversable*, so likewise must it be *proved* when material, as much as if it had been averred without a *videlicet*. As where in an action on the statute of usury, the agreement to forbear and ~~give day of payment~~ was stated in the declaration to be on the 1st ~~under a~~ *videlicet*, but it was proved that the money was not advanced until the 15th, on which Lord Mansfield nonsuited the plaintiff, being of opinion that the day from whence the forbearance took place was material though laid under a *videlicet*, and on a motion for a new trial, the court confirmed the decision at *nisi prius*. *Johnson v. Prickett*, E. 25 Geo. 3. K. B. cited by Lawrence justice in the above-cited case of *Grimwood v. Barrit*. So where in an action for a malicious prosecution the declaration stated that the indictment afterwards, *to wit*, on the 25th of February 1791, came on to be tried, but by the record of that indictment it appeared that the trial *was on a different day*, on which the plaintiff was nonsuited; and on a motion to set aside the nonsuit, the court thought the objection fatal, though it was laid under a *videlicet*, the day being material. 4 Term Rep. 590. *Pope v. Foster*. So in an action against an attorney for negligence in not prosecuting the plaintiff's debtor to judgment, the return of the writ on which the debtor was arrested was laid to be in the 25th year under a *videlicet*, and the writ itself appearing to have been returnable in the 24th year, this was held by the learned judge who tried the cause to be a fatal variance;

variance, though the day of the return was alleged under a *videlicet*, and on a motion to set aside the nonsuit the court confirmed it, being of opinion that the time, when the defendant ought to have charged the debtor in execution, depending on the *return* of the writ, the *return* became material, and therefore the variance was fatal. 1 Term Rep. 656 *Green v. Rennet*. And it was said by Buller justice in *The King v. Mayor of York*. 5 Term Rep. 71. that when the day is material, the laying it under a *videlicet* does not signify. S. P. 2 Bos. & Paul 116 *White v. Wilson*.

If the time laid under the *videlicet* be material, and it is repugnant to what goes before, it *vitiates the plea*. Latch. 200, 201. *Harvey v. Reynolds*, per Jones justice.

Hence it appears, that the difference taken in argument by Blackstone justice when at the bar in 1 Black. Rep. 495. *Bishop of Lincoln v. Wolfreston*, seems to be well founded, namely, "That the true distinction is, that where the time when a fact happened is immaterial, and it might as well have happened at another day, there, if alleged under a *scilicet*, it is absolutely nugatory and therefore not traversable, and if it be repugnant to the premises, it shall not vitiate the plea, but the *scilicet* itself shall be rejected as superfluous and void." But where the precise time is the very point and gist of the cause, there, the time alleged by the *scilicet* is conclusive and traversable; and it shall be intended to be the true time and no other: and, if impossible or repugnant to the premises, it will vitiate the plea; if true will support the de-

"fence." And the distinction seems equally to apply to every other matter which comes under a *videlicet*.

On the other hand, the want of a *videlicet* will in some cases make an averment material that would not otherwise be so; as if a thing, which is not material, is positively averred without a *videlicet*, though it was not necessary to be so, yet it is thereby made material and must be proved. Therefore where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a *videlicet*, for if he do not, he will be bound to prove the exact sum or day laid; it being a settled distinction that where any thing which is not material is laid under a *videlicet*, the party is not concluded by it; but he is, where there is no *videlicet*. 3 Term Rep. 68. *Symonds v. Knox*. So where the declaration stated that in consideration that the plaintiff would buy of the defendant forty-five sheep for 54*l.* 11*s.* 6*d.*, the defendant undertook and promised that they were found, the plaintiff proved the price to be 54*l.* 12*s.* 6*d.* Buller justice held the variance to be fatal, because the sum was not laid under a *videlicet*, and nonsuited the plaintiff. *Durston v. Tutban*. Taunton Sp. Ass. 1783. cited in 3 Term Rep. 67. *Symonds v. Knox*. It is said that there is a difference between an action on the contract itself, and an action upon the promise in law which arises from the debt. In the former case, if the party mistake the sum agreed on, he fails in his action; but in the latter (which is the common case of *indebitatus assumpsit*) he is entitled to recover though he mistake the sum. All. 29. *Baker v. Edwards*.

Case 47.

Gay *versus* Adams.

Mich. 18 Car. 2. Regis. . Rot. 272.

S. C. 2 Keb.
746. 1 Vent. 109.*Mutuo* may signify either to lend, or to borrow.

—A writ of error to certify the record of a plaint before the mayor, constables of the staple, and the sheriffs and bailiffs, shall be taken distributively, namely, before all those officers, or any of them.

ERROR of a judgment in debt in the court of *Bristol*, where the plaintiff there had declared, that the defendant *mutuasset* of the said plaintiff 70l. to be paid on request; wherefore the action was brought, and the plaintiff had judgment to recover his debt. And *Saunders* assigned for error that the declaration was not good, because the verb *mutuasset* signifies to lend, and not to borrow, for *mutuor* signifies to borrow, and *mutuo* to lend; and therefore the declaration being *mutuasset* and not *mutuatus fuisset*, was bad. But *non allocatur*; for in legal understanding, the word *mutuo* signifies as well to borrow as to lend.

Then it was moved that the record was not well removed; for the writ of error was directed “to the mayor and aldermen of the city of *Bristol*, and to the mayor and constables of the staple of *Bristol*, and also to the sheriffs of the same, and to the bailiffs of the mayor and commonalty of the said court of tolsey, and to the bailiffs and commonalty of his court of pyc-powder and to every of them:” and it was to certify a record of a judgment, “in a plaint which was before you in our court of the said city without our writ &c.” and the record is certified in this manner, to wit, “Pleas in the court of our lord the king of the tolsey of the said city &c., holden before *William Crabb* and *Richard Grumpe*, as well sheriffs of the county of the said city, as bailiffs of the mayor and commonalty of the said city, on *Wednesday* &c.” So the writ of error and the record certified do not agree; for the writ of error is to certify the record of a plaint before the mayor, constables of the staple, and the sheriffs of the said city *jointly*; and it is not said, “before you or any of you,” but the record certified is only before “as well sheriffs and bailiffs &c.” and therefore the record is not well removed; and thereon the court would advise &c.

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But afterwards in the same term the court held that the writ of error was sufficiently good to certify this record, and shall be taken distributively, namely, that the record of a judgment on a plaint which was before all the said officers, *or any of them*, should be certified, and therefore the judgment was affirmed (1).

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v.
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(1) In 1 Ld. Raym. 152. *Walker v. Stokoe*, note (a.) Lord *Holt* expresses his disapprobation of this case; and afterwards upon being cited by counsel in 2 Ld. Raym. 1200. 1202, 1203. *Reg. v. Baines*, it was said by *Powell* justice, that in the case in *Saunders*, the court

went much upon the constant form of writs of error to that court, which had always gone that way; and he heard chief justice *Saunders* say so; to which Lord *Holt* said, it would be hard to maintain the judgment otherwise.

Pope *versus* Brett.

Case 48.

ASSUMPSIT. The plaintiff declares upon three several promises for money, for work and labour, and for other money expended. The defendant pleads in bar an award, by which it was awarded that the said *William Pope* (the plaintiff) should be satisfied and paid by the said *John Brett* (the defendant) the money due and payable to the said *William Pope*, as well for task-work as for day-work, and then the said *William*, his executors, administrators or assigns should pay, or cause to be paid, to the said *John Brett*, his executors, administrators or assigns, the sum of 25l. of lawful money of *England*, on the 29th day of *April* then next following, in the then mansion-house of the said *John Brett*, in full payment and satisfaction of and for all debts, claims and demands whatsoever; and it was further awarded that upon payment of the said money each of the parties should give to the other a general release of all controversies &c., and the defendant avers that the task-work and day-work in the whole amounted to 12l. 10s. and no more, and that the defendant paid and satisfied the 12l. 10s. to the plaintiff, being all the money due to him for any task-work and day-work, and this &c., where-

S. C. 2 Keb. 736.
An award that A. shall be paid by B. money due for task-work, and then A. should pay 25l. to B. and that the parties should give each other a general release is void in the whole, for the uncertainty what sum should be paid for task-work.

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wherefore &c., to which plea in bar the plaintiff demurs in law.

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And *Sympton* for the plaintiff argued that the plea was bad, because the award was void for uncertainty, inasmuch as the arbitrator has not ascertained what sum should be paid for the task-work and day-work, but has left it in as great an uncertainty as it was before. And then the averment of the defendant of the sum it amounted to, and that he has paid it, is nothing to the purpose, because his averment cannot make the award good which was void at the time of making it; wherefore he concluded that the award was void, and consequently the plea insufficient.

Saunders for the defendant agreed that the award as to this clause was void; but he said that here there is a sufficient award without that clause; for the award is that the plaintiff should pay 25l. in certain to the defendant, and that general releases should be given to both parties, which is sufficient of itself without the other clause of task work and day-work. And an award may be void in one clause, and good for the residue. That was granted by the court; but the court said that here, if the clause of task-work and day-work be void, as it is admitted to be, the whole award is void; for it appears that the plaintiff was awarded to pay the 25l., and to give a general release upon a supposition by the arbitrator that he should be paid for the task-work and day-work by virtue of that award; and that not being so, it was not the intention of the arbitrator, as appears by the award itself, that the plaintiff should pay the money to the defendant and give him a general release, and yet receive nothing for the task-work and day-work, as by reason of the uncertainty of the award in that part he could not. But the arbitrator intended that the plaintiff should be satisfied for his task-work and day-work, and then he should pay the 25l. and give a release; but the plaintiff not having any remedy to recover satisfaction for his task-work and day-work by the award, he is not bound to perform any part of it. But true it is, that in some cases an award may be void in part, and good for the residue; as if an award be made between A. of the one part, and B. of the other, by which it is awarded that A. should pay 10l. to B., and also that A. should pay 5l.

An award may be good in part, and void for the residue.

to a stranger, (b) and that B. should give A. a general release; here the award to pay 5l. to the stranger is void, and yet the award is good for the residue; for B. is not prejudiced though the 5l. be not paid to the stranger, for no more than 10l. was intended for him or his benefit (1): but in the case at bar it is otherwise; for here the plaintiff

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(b) S. P. 1 Roll.
Abr. 259. pl. 8.
Samon v. Pit,
Cro. Eliz. 432.
S. C.

shall

(1) But where in debt on bond to perform an award, by which it was awarded that the defendant should pay the plaintiff 16l. 10s. and all such costs, charges and expences, as the plaintiff had been put unto in a certain cause then depending between the parties, at a certain day then to come, and that *thereupon* they should give each other general releases; the breach assigned in the replication was in the non-payment of the said 16l. 10s., and on demurrer it was objected first, that no certain costs, charges and expences were set down and averred; secondly, that the award did not mention any cause between the parties depending in any certain court, and it might be in an inferior court; and thirdly, that there was nothing awarded to the defendant but a release, and that was not to be made until all the rest were performed; and although the award were good for the 16l. 10s. which were certain, yet the costs, charges and expences of the suit were totally uncertain and void, and the award in that part could never be performed, and so the release to the defendant could never be made, for it was to be made *thereupon*. To which it was answered and resolved, that there was no doubt but an award might be good in part and bad in part; and if

the award was good in that part upon which the breach was assigned, and the defendant demurred, whereby he admitted the breach, the plaintiff must have judgment; and as to the costs that the recovery in that action would be a bar to any future action on the bond for non-payment of those costs. 2 Will. 267. *Fox v. Smith*. So where in debt upon bond to perform an award, by which it was awarded that the defendant should, on a certain day therein mentioned, pay to the plaintiff the sum of 4l. 15s., and all costs and charges due to the steward and attornies on account of an action of replevin depending in the court of the hundred of *Norman Cross*, and all the costs and charges of the arbitration bonds and of the award, and that the parties should execute mutual general releases; the breach assigned in the replication was, that the defendant had not paid to the plaintiff the said sum of 4l. 15s.: and on demurrer it was objected, that the award was void in awarding costs in an inferior court unsettled and uncertain, and did not make a final end between the parties; but it was adjudged that the award was good for the payment of the 4l. 15s., and the mutual releases made a final end between the parties, and though other parts of the award were bad, yet the breach

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shall pay 25l. and give a release, and yet cannot have the benefit of the task-work and day-work which was intended for him by the award, and without which the arbitrator did not intend that the plaintiff should either pay the 25l. or give any release—And for this reason it was adjudged for the plaintiff.
—Note a good diversity.

breach was well assigned. 2 Will. 293. *Addison v. Gray*. The same point had been long before determined in the case of *Bargrave v. Atkins*. 3 Lev. 413. which was, debt on bond conditioned to perform an award of all controversies, &c. The defendant pleaded no award; the plaintiff replied, and set out an award that the defendant should pay to the plaintiff 7l. 10s. on the 11th of May then following, and also all the expences of a suit prosecuted by the plaintiff against the defendant, and all reasonable expences which the plaintiff had sustained about the said suit; and *thereupon* each of the parties should execute general releases one to the other, and assign a breach in non-payment of the 7l. 10s. The defendant rejoined, that the arbitrator made no such award; upon which issue and verdict for the plaintiff. And it was moved, in arrest of judgment, that the award was void; for nothing was awarded to the defendant but the release, and it was not to be executed until all the rest was performed. And although the award was good for the 7l. 10s. which was certain, yet the expences of the suit, and all the reasonable expences which the plaintiff had incurred about his suit

were all uncertain, and the award was void as to them, and in that part could never be performed; and so the release could never be made, for it was to be made *thereupon*. And so held the court when it was first moved; but afterwards on the authority of *Pinkney v. Bullock*, East. 23 Car. 2. where the award was to pay 10l. and the charges of making the award, each to release the other, though it was void as to the charges, yet on the payment of 10l. which was good, it was held that the release ought to be made; so in the principal case; wherefore judgment for the plaintiff.

However, these cases differ from the present; and there seems to be no doubt that the principle of the resolution in the principal case is well founded, namely, that if by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompence or consideration for that which he is to do to the other, the award is void in the whole. 1 Roll. Abr. 259. pl. 9, 10. S. P. See 1 Saund. 32. *Birks v. Trippet*. 324, *Veale v. Warner*, note (2). *Ante* 61. *Hodsdon v. Harridge*. 127. *Coppin v. Hurnard*.

White *versus* Stubbs.

Case 49.

Mich. 22 Car. 2. Regis. Rot. 85.

TRESPASS for breaking the plaintiff's chamber, parcel of a dwelling-house in the parish of *St. Giles* in the Fields in the county of *Middlesex*, and keeping possession for the space of a month, and for taking and carrying away divers goods and chattels of the plaintiff there found, so that the said *Catharine* (the plaintiff) could not find the said goods and chattels in order that they might be replevied according to the law and custom of this realm of *England*, and by reason thereof the said *Catharine* has entirely lost and been deprived of the said goods and chattels, to the plaintiff's damage of 100l. And the trespass was laid to be on the 9th day of *October*, in the 20th year of the reign of our lord the now king.

The defendant as to all the trespasss, except the taking and carrying away of part of the goods and chattels particularly mentioned in his plea, pleads not guilty; and as to the taking and carrying away of the said part of the goods, he justifies that before the time of the trespasss one *Norcliffe* was seised in fee of the said dwelling-house whereof the said chamber was parcel, and so seised demised the said dwelling-house to one *Botcher*, to have for a year next after the feast of *St. John* the Baptist in the 20th year aforesaid, who entered, and afterwards on the 26th day of *June* in the 20th year aforesaid assigned his interest to the defendant, by virtue of which he entered and was possessed, and so possessed afterwards, to wit, on the 16th day of *July* in the 20th year aforesaid, demised the said chamber in which &c. to the plaintiff, to have for a quarter of a year then next following, by force of which demise the plaintiff entered and was possessed. And the defendant further said that "the term of the said *Catharine* of and in the said chamber with the appurtenances in which &c., ended on the 16th day of *November* in the 20th year aforesaid, and that the said goods and chattels last above mentioned (that is, the goods justified to be taken away) after the end of the said term of the said *Catharine*, to wit, on the day of

S. C. 1 Lev.

307.

2 Keb. 712.

735.

In trespass if the defendant in his plea claims an interest in the place in which &c. the plaintiff cannot reply *de injuriâ suâ propriâ absque tali causâ*.—If the defendant pleads an assignment of a term to himself which is expired, and justifies on another day, and not on the same day which is laid in the declaration, he must traverse the time before the assignment and after the end of it.

November

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November in the 20th year aforesaid, were in the said chamber in which &c. doing damage there, wherefore the said Robert Stubbs (the defendant) afterwards, to wit, on the same day of November in the 20th year aforesaid, took and carried away the said goods and chattels, so as aforesaid being in the said chamber so doing damage there, for the said damage so done there, as it was lawful for him to do for the cause afor. said, which is the same trespass as &c., whereof the plaintiff has complained against him, without this that the said Robert is guilty of the said trespass on the said 9th day of October in the 20th year aforesaid, or at any other time within the term of a quarter of a year in form aforesaid demitted to the said Catherine. And this &c., wherefore &c. The plaintiff replied of his own wrong without any such cause generally, to which replication the defendant demurred.

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And the replication was agreed by the court and counsel to be bad for the reason given in *Crogate's case*. 8 Rep. 66. (1) b. 2d. resolution.

But

(1) Because the defendant in his plea claims *an interest* in the chamber in which the trespass is alleged to have been committed.

It was also adjudged in the above-cited case, first resolution, that the words *absque tali causâ*, do refer to the whole plea; and therefore in false imprisonment, if the defendant justifies by a *capias* to the sheriff, and a warrant from him to the defendant, *de injuriâ suâ propriâ absque tali causâ*, is no good replication: for then matter of record, namely, the *capias*, will be parcel of the cause, as well as the warrant from the sheriff to the defendant, for *al!* makes but one cause (*tali causâ*); and matter of record ought not to be put in issue to the jury, but the plaintiff may in such case reply *de injuriâ suâ propriâ* and traverse the warrant, which is matter of fact.

The doctrine of *Crogate's case* has never been disputed or called in question; but has always been considered as a leading case upon this subject. It was cited and relied upon as an authority in point to govern a late case, in which an attempt was made to put the defendant's title in issue, by this general plea of *de injuriâ suâ propriâ*. That was replevin; cognisance, stating that the place in which, &c. was a house held by the defendant, under a demise from one J. O. at a yearly rent of 42l. payable on the quarterly feast days; that 31l. of the said rent was due and in arrear to the said J. O. and the defendant as bailiff of the said J. O. took &c.; plea in bar, *de injuriâ suâ propriâ absque tali causâ*; and on demurrer to this plea, the court decided that the plea was bad: and Eyre chief justice, who delivered the judgment of the court, said, that it was

But *Pollexfen* for the plaintiff excepted to the defendant's plea, because the defendant has alleged a lease made by himself to the plaintiff for a quarter of a year, and has traversed his being guilty within the time of that lease; but has not traversed the trespass before the assignment of the lease to him, or since the expiration of it. For he ought to have traversed

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only necessary to read *Crogate's* case, to be perfectly satisfied, that on the authorities and reason of the thing the plea in bar was bad. The second resolution in that case is, "that when the defendant in his own right, or as servant to any other, claims an interest in the land, or to any common, or rent going out of the land, or to any way or passage upon the land, &c. there *de injuriâ suâ propriâ* generally is no plea. That if the defendant justifies as servant, there *de injuriâ suâ propriâ* in some of the said cases, with a traverse of the commandment, the same being made material, is good, &c. For the general replication *de injuriâ suâ propriâ* is properly when the defendant's plea does consist merely upon excuse, and upon no matter of interest whatsoever. And it is said *de injuriâ suâ propriâ*, because the injury properly in this sense is to the person or to the fame, as battery, or imprisonment to the person, or scandal to the same, there if the defendant excuse himself upon his own assault, or upon hue and cry, there properly *de injuriâ suâ propriâ* generally is a good plea, for there the defendant's plea does consist only of matter of excuse." The third resolution is, "that when by the defendant's plea any authority or power is mediately or im-

mediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*." Thus in that case the rule was distinctly laid down, that the replication *de injuriâ suâ propriâ* was only to be received where the defence set up is matter of excuse, and not where it asserts any right or interest. Nor was that all; for if the defence turned on the plea of commandment, *de injuriâ suâ propria* was not good, but the commandment must be answered. In the case of *Cockerel v. Armstrong*, Bull. N. P. 93, (since reported in Willes's Rep. 99,) which was trespass for taking a gelding, and the defendant pleaded that the place where, &c. was 100 acres, &c., that J. S. was seised in fee, and that he as his servant, and by his express orders, took the gelding damage-feasant; it was held that the plaintiff could not reply *de injuriâ suâ propriâ absque tali causâ*, for that would put in issue three or four things; but he must traverse one thing in particular. That case was right in point of authority, and he agreed with the rule laid down, that where the excuse arises in part out of the seisin in fee of another, there *de injuriâ suâ propriâ* is not to be received; but the reason is not because it puts two or three things in issue;

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traversed in this manner, "without this that he the said defendant is guilty of the said trespass on the said 9th day of *October*, or at any other time within the term of a quarter of a year in form aforesaid demised to the plaintiff, or before the assignment of the said term of one year so as aforesaid made to the said defendant, or after the end of the said term &c." for now if the defendant be in truth guilty either before the commencement of his term, or after the end of it, he has by this traverse left no issue for the plaintiff to take upon it.

Saunders for the defendant answered, that the plaintiff has admitted that the trespass was committed within the term assigned to the defendant. For the trespass was laid on the 9th day of *October* in the 20th year, which is within the term of a year assigned to the defendant; and therefore there is no necessity for the defendant to traverse before or after the term, when the time is admitted by the plaintiff himself to be within the term assigned to the defendant.

When the defendant in trespass justifies on the same day with that laid in the declaration, he need not traverse the day.

Sed non allocatur per curiam; For true it is where the plaintiff has laid in his declaration a day when the trespass was committed, and the defendant justifies the trespass on the *same day*, there is no necessity for the defendant to make any traverse of the day, because both parties agree in it; here though the

for that may happen in every case where the defence arises out of several facts, all operating to one point of excuse; the reason is, because this plea is only allowed where an excuse is offered for personal injuries, and not even then, if it relates to any interest in land, or to any commandment. It was right that the case then before the court should be brought within the general rules of pleading, otherwise the 11 Geo. 2. c. 19., which was intended to operate for the ease and benefit of landlords, would be turned against them; for before the making of that statute, the issue in replevin must have been confined to some one material point. If the court were to break in upon the

rule so satisfactorily laid down in *Croget's case*, they would confound all the rules of pleading. If they admitted the plea in that case, there was no reason why it should not be let in in *Quare Impedit*, and every other case. 1 Bos. & Pull. 76. *Jones v. Kitchen*. Yet if the title alleged be only inducement, *de injuriâ suâ propriâ* generally is a good replication; as in battery, if the defendant pleads that he was seized in fee of a close, and had cut his corn, and the plaintiff came to take away his corn and he in his defence, &c. there the plaintiff may reply *de injuriâ suâ propriâ absque tali causâ*. Yelv. 157. *Taylor v. Markham*. Cro. Jac. 224. S. C. Latch. 221. *Hale v. Gerrard*.
plaintiff

plaintiff has laid the trespass on a day within the term assigned to the defendant, yet the defendant has in his plea traversed that day, and so has put the matter at large, whereby now it does not appear to the court upon what day the trespass was committed. For the defendant denies that the trespass was committed on the same day that the plaintiff has laid in his declaration; so that, for any thing that appears to the contrary, the trespass might have been on any day either before the assignment, or after the end of the term assigned to the defendant, and therefore he ought to have traversed the whole time except the time when he had a title by the lease so assigned to him (2). Wherefore it was adjudged for the plaintiff.

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(2) If the defendant, instead of justifying, had pleaded the general issue, the plaintiff would not have been bound to prove the trespass committed on the day laid in the declaration; but would have been at liberty to prove it on any day before the action brought, and consequently either on some day during the continuance of the lease from the defendant to the plaintiff, or before the assignment of the term to the defendant, or after the end of it; in either of which cases the defendant would have been a trespasser, inasmuch as he had no right to distrain the plaintiff's goods damage-feasant at either of those periods. In like manner, where the defendant justifies, and denies that the trespass was committed on the day laid

in the declaration, he is bound further to deny that he committed the trespass on any of the before-mentioned times when he had no right to distrain the plaintiff's goods, otherwise his justification is not a complete answer to the trespass. It was material in this case for the defendant to shew that he distrained the plaintiff's goods during the term assigned to him, and also after the end of the lease which he had granted to the plaintiff; and to traverse that he was guilty of the trespass during the existence of the lease to the plaintiff, or before the term was assigned to him, or after the end of it. See ante p. 5. *Mellor v. Walker*, note (3), 1 Salk. 222. *Webly v. Palmer*.

Case 50.

The Dean and Chapter of Windsor *versus*
Gover.

Trin. 22 Car. 2. Regis. Rot. 441.

Debt for rent
against lessee of
tithes.

Plaintiff by
indenture.

Profer.

Fernised to the
defendant a por-
tion of tithes.

LONDON, to wit. Be it remembered that heretofore, to wit, in the term of St. *Michael* last past, before our lord the king at *Westminster* came the dean and chapter of the king's free chapel of St. *George* within the castle of *Windsor*, by *Richard Thomas* their attorney, and brought here into the court of our said lord the king then there their certain bill against *Christopher Gover* gent. in the custody of the marshal, &c. of a plea of debt, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit: *London* to wit, The dean and chapter of the king's free chapel of St. *George* within the castle of *Windsor* complain of *Christopher Gover* gent. being in the custody of the marshal of the marshalsea of our lord the king before the king himself of a plea that he render to them 260l. of lawful money of *England* which he owes to and unjustly detains from them; for that whereas the said dean and chapter on the 20th day of *October* in the 12th year of the reign of our lord *Charles* the second now king of *England*, &c. at *London*, to wit, in the parish of St. *Mary-le-Bow* in the ward of *Cheap*, by a certain indenture then and there made between the said dean and chapter, by the names of the dean and canons of the king's free chapel of St. *George* within his castle of *Windsor* of the one part, and the said *Christopher Gover* by the name of *Christopher Gover* of *Ottery St. Mary* in the county of *Devon* gent. of the other part (one part of which said indenture sealed with the seal of the said *Christopher* the said dean and chapter bring here into court, the date whereof is the same day and year aforesaid,) demised, granted, and to farm let to the said *Christopher Gover* all that parcel or portion of tithes of corn and grain, called, town-mow, in the said parish of *Ottery St. Mary*, with all and singular the rights, members, and appurtenances thereunto belonging, or in anywise appertaining; to have and to hold the said

saïd parcel or portion of tithes with the appurtenances to the saïd *Christopher* his executors, administrators, and assigns, from the feast of *St. Michael* the archangel then last past before the date of the saïd indenture, unto the end and term of 21 years then next following fully to be complete and ended: yielding and paying therefore yearly for every year during the saïd term to the saïd dean and chapter and their successors or certain attorney, in the south porch of the saïd free chapel, 52l. of lawful money of *England* at the two usual terms in the year, to wit, at the feasts of the Annunciation of the blessed virgin *Mary*, and *St. Michael* the archangel, by equal portions; by virtue of which saïd demise the saïd *Christopher* entered into the saïd parcel or portion of tithes with the appurtenances and was thereof possessed, and from thence hitherto has quietly and peaceably had, held and occupied the saïd parcel or portion of tithes with the appurtenances. Yet 26ol. of the saïd rent for five years, ended on the feast of *St. Michael* the archangel in the 21st year of the reign of our saïd lord the now king, were and still are in arrear and unpaid to the saïd dean and chapter; whereby an action has accrued to the saïd dean and chapter to demand and have of and from the saïd *Christopher* the saïd 26ol.: yet the saïd *Christopher* (although often required) has not yet paid the saïd 26ol. to the saïd dean and chapter, but to pay the same to them has hitherto altogether refused and still refuses, to the damage of the saïd dean and chapter of 2ol.: and therefore they bring suit &c.

And now at this day, to wit, on *Friday* next after the morrow of the holy *Trinity* in this same term, until which day the saïd *Christopher* had leave to imparl to the saïd bill and then to answer &c. before our lord the king at *Westminster* come as well the saïd dean and chapter by their saïd attorney, as the saïd *Christopher* Gover by *John Savage* his attorney; and the saïd *Christopher* defends the wrong and injury when &c. and as to 52l. parcel of the saïd 26ol. in the saïd declaration above mentioned, for the saïd rent for the first year of the saïd five years, in the saïd declaration likewise specified, ended on the feast of *St. Michael* the archangel in the 17th. year of the reign of our saïd lord the now king, he the saïd *Christopher*

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Hibendum to defendant, his executors and assigns for twenty-one years, at the yearly rent of 52l. payable half-yearly;

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by virtue whereof defendant entered and was possessed,

26ol. due for five years' rent;

whereby an action has accrued, &c.

Breach.

Plea,

as to 52l. parcel of the saïd 26ol. for one year's rent, *nil debet*, and issue thereon.

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and as to the re-
sidue of the rent
defendant pleads
that before that
became due, he
assigned the term
to one J. V.

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says that he does not (1) owe to the said dean and chapter of the king's free chapel of St. George within the castle of *Windsor* the said 52l. or any penny thereof, in manner and form as the said dean and chapter above thereof complain against him, and of this he puts himself upon the country; and the said dean and chapter of the king's free chapel of St. George within the said castle of *Windsor* likewise &c.: and as to 208l. residue of the said 260l. the said *Christopher* says, that the said dean and chapter of the king's free chapel of St. George within the castle of *Windsor* ought not to have or maintain their said action thereof against him, because he says that after the said demise of the said parcel or portion of tithes of corn and grain as aforesaid made by the said dean and chapter to the said *Christopher Gover*, and long before the said rent of 208l. for the four last years of the said five years in the said declaration specified, or any part thereof, became due, to wit, on the 24th day of *January* in the said 12th year of the reign of our said lord the now king, at *London* aforesaid in the parish and ward aforesaid, he the said *Christopher Gover* by his certain (2) indenture, sealed with his seal and bearing date the same day and year aforesaid, granted and assigned all his interest and term of years, which he then had to come of and in the said parcel or portion of the said tithes with the appurtenances, to one *John Vaughan* esq.; by virtue of which said grant

(1) This is a good plea in debt for rent upon a lease by indenture; for the foundation of the action is a mere fact, namely the arrears of rent, and the indenture is held to be only inducement, which the plaintiff need not set out in the declaration. 2 Ld. Raym. 1503. *Warren v. Consett*. Cowp. 589. *Warner v. Theobald*, Bull. N. P. 170. and see 1 Saund. 39. *Jones v. Pope*, note (3). But though it be not necessary in general to set out the indenture in the declaration in debt for rent, yet it seems to have been necessary in this case, because it was debt for rent

on a lease of tithes, which, being an incorporeal hereditament lying in grant, could not be granted without deed. See 1 Saund. 276. *Duppa v. Mayo*, notes 1 and 2.

(2) For the same reason it was necessary to allege in the plea, that the defendant the lessee of the tithes, assigned the term by indenture: for that was always required by the common law; and the statute of frauds 29 Car. 2. does not apply to cases of incorporeal hereditaments, for they were not within the mischief intended to be remedied by that statute.

the

the said *John Vaughan* entered into the said parcel or portion of the said tithes with the appurtenances and was thereof possessed. And the said *Christopher Gover* further says that the said dean and chapter afterwards, to wit, on the 25th day of *March* in the 13th year of the reign of our said lord the now king, at *London* aforesaid in the parish and ward aforesaid, had notice of the said grant and assignment, and knowing of the said grant and assignment afterwards, to wit, on the same day and year last aforesaid, at *London* aforesaid in the parish and ward aforesaid, accepted and received from the said *John Vaughan* the said rent so as aforesaid above reserved for the said tithes, to wit, 6d. of the said rent, and then and there accepted him the said *John Vaughan* as their tenant of the said tithes. And this he is ready to verify; wherefore he prays judgment if the said dean and chapter ought to have or maintain their said action thereof against him &c.

The Dean and Chapter of *Winton* &c. &c.

Plaintiff sheweth that the said *John Vaughan* is a tenant of the said tithes as their tenant.

And the said dean and chapter say that they, by reason of any thing by the said *Christopher Gover* above in pleading alleged, ought not to be barred from having their aforesaid action thereof against him the said *Christopher*, because, as to the said plea of the said *Christopher* in manner and form aforesaid above pleaded, as to the said 208l. residue of the said 260l. in the said plea of the said *Christopher* above specified, they say, that the plea aforesaid by the said *Christopher* in manner and form aforesaid above in that behalf pleaded, and the matter in the same contained, are not sufficient in law to bar the said dean and chapter from having their said action thereof in that behalf against the said *Christopher*, and that they the said dean and chapter have no necessity, nor are bound by the law of the land in any manner to answer, and this they are ready to verify; wherefore for want of a sufficient answer in this behalf, the said dean and chapter pray judgment, and their said debt as to the said 208l., together with their damages by reason of the detention of the said debt to be adjudged to them &c.

Defurrer.

And the said *Christopher Gover*, as to the aforesaid plea of the said *Christopher* in manner and form aforesaid above pleaded as to the said 208l. residue of the said 260l. above mentioned, says, that the said plea by him the said *Christo-*

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Joinder.

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*Curia advisare
vult, as to the
demurrer.*

*Venire awarded
to try issue.*

*Uterius advisare
as to the de-
murrer.*

*Procomes non
mist breve as to
the issue.
Alias venire.*

pher in manner and form aforesaid above in that behalf pleaded, and the matter in the same contained, are good and sufficient in law to bar the said dean and chapter from having their said action thereof in that behalf against the said *Christopher*, which said plea and the matter in the same contained, he the said *Christopher* is ready to verify and prove as the court &c., and because the said dean and chapter have not answered the said plea, nor have hitherto in any wise denied the same, the said *Christopher*, as before, prays judgment, and that the said dean and chapter may be barred from having their said action thereof as to the said 20thl. residue &c. against him the said *Christopher*. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, whereof the said parties have put themselves upon the judgment of the court, a day therefore is given to the said parties before our lord the king at *Westminster*, until *Wednesday* next after 15 days of the holy *Trinity* to hear their judgment of and upon the said premises, because the court of our said lord the king now here is not yet advised thereof &c. And to try the said issue above joined between the said parties to be tried by the country, let a jury thereof come before our lord the king at *Westminster*, at the day aforesaid, and who neither &c., to recognize &c., because as well &c., the same day is given to the said parties there. At which day before our lord the king at *Westminster* come the said parties by their said attornies, and because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises, whereof the said parties have put themselves upon the judgment of the court, a day therefore is given to the said parties before our said lord the king at *Westminster*, until *Monday* next after three weeks of *St. Michael* to hear their judgment of and upon the said premises, because the court of our said lord the king here is not yet advised thereof &c. And as to try the said issue above joined between the said parties to be tried by the country, the sheriff has not sent his writ. Therefore as before let a jury thereof come before our lord the king at *Westminster* at the said day, and who neither &c., to recognize &c., because as well &c., the same day is given to the said parties there

there &c. At which day, before our lord the king at *Westminster*, come the said dean and chapter of the king's free chapel of *St. George* within the castle of *Windsor* aforesaid by *Daniel Vinicombe* their said attorney, and the said *Christopher* by his said attorney, and because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises whereof the said parties have put themselves upon the judgment of the court, a day is therefore given to the said parties, before our lord the king at *Westminster*, until *Monday* next after the octave of *St. Hilary*, to hear their judgment of and upon the said premises, because the court of our said lord the king here is not yet advised thereof &c., and as to try the said issue above joined between the said parties to be tried by the country, the sheriff has not sent his writ therein, therefore as oftentimes before let a jury thereof come before our said lord the king at *Westminster* at the said day, and who neither &c., to recognize &c., because as well &c., the same day is given to the said parties there &c. At which day before our lord the king at *Westminster* come the parties aforesaid by their attornies aforesaid, whereupon all and singular the premises, whereof the said parties have put themselves upon the judgment of the court, being seen and by the court of our said lord the king here more fully understood, and mature deliberation having been thereupon had, for that it seems to the court of our said lord the king here, that the said plea of the said *Christopher* as to the said 208l. residue of the said 260l. in manner and form aforesaid above pleaded, and the matter in the same contained are not sufficient in law to bar the said dean and chapter from having their said action thereof in form aforesaid against the said *Christopher*. Therefore it is considered that the said dean and chapter recover against the said *Christopher* the said 208l. parcel of the said 260l. (3) But because it is necessary that there be but one taxation.

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Curia advisare.

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Viccomes non
misit breve.

Pluries venire.

Judgment for
the plaintiffs on
the demurrer.

Unica taxatio.

(3) Where there are several issues in law and in fact, it seems now in practice to be entirely in the plaintiff's option to have the issues in law or demurrer de-

termined either before, or after, the trial of the other issues: though it is said, that formerly the court used to decide which of them should be first tried

or

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Venire as well to
try this issue as
to inquire of the
damages.

taxation (4) of damages in this behalf, therefore let the taxation of damages as to the said 208l. be staid until the said issue above joined between the said parties to be tried by the country be determined. And as to try the said issue, the sheriff has not sent his writ. Therefore as well to try the said issue, as to inquire what damages the said dean and chapter have

or determined. Gilb H. C. P. 67. 3d edit. It is however often advisable to determine the demurrer first, for if it goes to the whole cause of action, and is determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact is first tried and found for the plaintiff, he must still proceed to the determination of the demurrer, and if that be determined against him, he will not be allowed his costs on the trial of the issue in fact. If the issue is tried before the demurrer is argued, the damages are said to be *contingent*, depending upon the event of the demurrer, and it is necessary for the jury to assess contingent damages; and then the award of the *venire* is as well to try the issue as to inquire of the contingent damages. See the form, 1 Saund. 109. 12. 26. 341. Tidd's Prac. Forms, 200. Where the demurrer is determined before the trial of the issues, the proper form seems to be, to continue on the pleasroll, as in this entry, the demurrer by a *curia advisare vult*, and the issues by a *vicecomes non misit breve* to the same day: though even then it is sometimes the form, to award a *venire* as well to try the issue as the contingent damage, and then to continue the demurrer by a *curia advisare vult*, and the issue by a *vicecomes non misit breve*. 1 Saund. 12. 341.

(4) If the demurrer is determined in favour of the plaintiff before the trial of the issue, as was the case here, the award of the *venire* is, as well to try the issue, as to assess the damages upon the demurrer *absolutely*, and not *conditionally*, as where the issue is first tried; and if the plaintiff, in consequence of such determination in his favour, is entitled to damages, the form is to enter an *unica taxatio damnorum* to postpone the assessment of such damages until the trial of the issue in fact. But where the issue in fact is first tried, an *unica taxatio* is unnecessary, because, as it has been already observed, the jury who tried the issue in fact will of course assess the damages. So where one defendant pleads to issue, and the other lets judgment go against him by default, there the form is also to enter an *unica taxatio*, to postpone the assessment of the damages on the judgment until the trial of the issue, and the award of the *venire* is as well to try the issue, as to inquire of the damages, thus: "But because it is unknown to the court here, what damages the said A. B. has sustained by reason thereof; and because it is also at present unknown to the court here, whether the said C. D. (the defendant who pleaded to issue) will be convicted of the premises upon which the said issue is above

have sustained by reason of the detention of the said debt, let a jury thereof come before our lord the king on *Tuesday* next after 15 days of *St. Hilary*, and who neither &c., to recognize &c., because as well &c., the same day is given to the said parties there &c. Afterwards the process being continued between the parties aforesaid in the plea aforesaid by the jury being put in respite between them before our lord the king at *Westminster*, until *Monday* next after the octave of the purification of the blessed *Mary* then next following, unless our said lord the king's right trusty and well-beloved Sir *John Kelynge* knt., chief justice of our said lord the king assigned to hold pleas in the court of our said lord the king before the king himself, shall first come on *Saturday* next after the octave of the purification of the blessed *Mary*, at *Guildhall London*, according to the form of the statute for default of jurors &c. At which day before our lord the king at *Westminster* came the said dean and chapter by the said *Daniel Vinicombe* their attorney, and the said chief-justice before whom &c., sent here his record had before him in these words, to wit: Afterwards on the day and at the place within contained before our said lord the king's right-trusty and well beloved Sir *John Kelynge* knt. the chief-justice within written, *John Squire* being associated unto him according to the form of the statute &c., come the within named dean and chapter of the king's free chapel of *St. George* within the castle of *Windsor* by their attorney within written, and the said *Christopher Gover* although solemnly required, comes not but makes default, therefore let the jurors of the jury whereof mention is within made be taken against him by default: and the jurors of that jury being summoned, some of them, to wit, W. S., P. G., C. T., N. C., A. Y., W. S., H. S., E. B.,

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Processu continu-
at.

Nisi prius.

Postea.

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“ above joined between the said A. B.
“ and the said C. D. or not; and be-
“ cause it is convenient and necessary,
“ that there be but one taxation of da-
“ mages in this suit, therefore let the
“ giving of judgment in this behalf
“ against the said E. F. (the defendant

“ who let judgment go by default) be
“ staid until the trial or determination
“ of the said issue above joined between
“ the said A. B. and C. D., and as
“ well to try the said issue above joined
“ between the said A. B. and C. D.,
“ as to inquire against the said E. F. &c.”

B. F.,

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B. F., and W. G., come and are sworn upon that jury; and because the residue of the jurors of the same jury do not appear, therefore others of the by-standers, being chosen by the sheriffs of the city of *London* within written at the request of the said dean and chapter, and by the command of the said chief-justice, are appointed anew, whose names are annexed to the within written panel according to the form of the statute in that case made and provided. Which said jurors so appointed anew, that is to say, N. K. and B. B. being called, likewise come, who, together with the said other jurors before impanelled and sworn, being chosen, tried and sworn to speak the truth of the matters within contained, say upon their oath, that the said *Christopher Gover* doth owe to the said dean and chapter of the king's free chapel of St. *George* within the castle of *Windsor* aforesaid, the said 52l. parcel of the within-mentioned 260l. for rent for the first year of the within-mentioned five years, ended on the feast of St. *Michael* the archangel, in the 17th year of the reign of our said lord the now king in manner and form as the said dean and chapter within complain thereof against him, and they assess the damages of the said dean and chapter by reason of the detention of the within-written debt, besides their costs and charges by them about their suit in this behalf expended to 10l., and for these costs and charges to 5l. 3s. 4d. Therefore it is considered that the said dean and chapter recover against the said *Christopher* the said 52l. residue of the said 260l. and the said damages by the said jury in form aforesaid assessed, and also 17l. 6s. 8d. for their costs and charges by the court of our said lord the king now here adjudged to the said dean and chapter with their assent, which said damages in the whole amount to 30l., and the said *Christopher* in mercy &c.

Judgment
thereon.

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Trin. 22 Car. 2. Regis. Rot. 441.

DEBT for rent by the dean and chapter of *Windsor* against *Gover*; the plaintiffs declare that on the 20th day of *October* in the 12th year of the reign of the now king, by indenture under their common seal they demised to the defendant a portion of tithes in the parish of *Ottery St. Mary* in the county of *Devon*; to have from *Michaelmas* then last past for 21 years; yielding yearly 52l., at two feasts, namely, the Annunciation of the Virgin *Mary*, and *St. Michael* the archangel, by equal portions; by virtue of which demise the defendant entered and was possessed, and that 260l. of the said rent for five years ended at the feast of *St. Michael* in the 21st year of the reign of the now king, was in arrear and unpaid, whereby an action hath accrued, &c.

The defendant as to 52l. of the said rent for the first year of the said five years pleads *nil debet*: and as to the residue of the said rent demanded, the defendant pleads in bar, that after the said demise, and before any part of the said residue of the rent became due, to wit, on the 24th of *January* in the 12th year aforesaid, the defendant by deed assigned over all his term and interest in the said portion of tithes to one *John Vaughan*, by virtue whereof the said *John Vaughan* entered and was possessed; and the defendant further avers that the plaintiffs afterwards, to wit, on the 25th day of *March* in the 13th year aforesaid, had notice of the said assignment, and accepted and received from the said *John Vaughan* the said rent so as aforesaid above reserved for the said tithes, to wit, 6d. of the said rent, and then and there accepted him, the said *John Vaughan*, as their tenant of the said tithes. And this, &c. wherefore, &c., upon which the plaintiff demurred in law.

And the point of law was, whether the rent reserved on the said lease made of *tithes* only, and not of any corporeal thing out of which a rent may be properly reserved, be such

S. C. 1 Vent. 98.
Sir T. Raym.
127.
1 Lev. 308.
2 Keb. 683.
727. 737. 775.
Qu. Whether
rent reserved on
a lease of tithes
only, runs with
the tithes to the
assignee, or lies
only in privity
of contract, so
that the assignee
is not chargeable
with it; and
consequently
whether by ac-
ceptance of such
rent from the
assignee, the first
lessee is discharg-
ed from the rent
in future, or
not—Whether
rent may be re-
served out of
any incorporeal
hereditaments.

a rent

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(a) Moor 778.
S. C.

Talentine v. Denton, Cro. Jac. 111. (a) it is agreed by *Yelverton*, *Williams* and *Tanfield*, that if a bishop make a lease for years of tithes only, reserving the ancient rent, such lease will bind the successor; but not if a bishop make such a lease for life; and the reason is, because on a lease for years the successor has remedy for the rent reserved by an action of debt, but he has no remedy for the rent reserved on such a lease for life (8). And this resolution was 20 years after *Jewel's* case, which, as may well be collected out of the book, was a case upon a lease for life and not for years, and so no resolution in the point, but at the end of the case an extrajudicial opinion on the point of a lease for years (9). Then if the successor of a bishop has a remedy by action of debt for such rent reserved on a lease for years, it follows that it is such a rent as will go with the reversion, and does not lie in privity of contract; for the successor of a bishop, who was lessor, is not privy to the contract of his predecessor, but has only a privity of estate, namely, the reversion (10): and consequently the rent in the case at bar will go along with the term to the assignee, who will be bound to pay it to the lessors; and they having in the present case accepted him to

(8) No action of debt lay at the common law for rent reserved on a lease for life during the continuance of such lease 1 Roll. Abr. 594. (G). pl. 1. 4 Rep. 49. *Oguel's* case. But now by statute 8 Ann. c. 14. s. 4 reciting that no action of debt lay against tenant for life or lives, for any arrears of rent during the continuance of such estate for life or lives, it is enacted, that it shall be lawful for any person, having any rent in arrear or due upon any lease or demise for life or lives, to bring an action of debt for such arrears of rent, in the same manner as they might have done in case such rent were due or reserved upon a lease for years.

(9) The court of common pleas were also of opinion in *Bally v. Wells*, 3 Will. 32. that *Jewel's* case, as far as it respects the point of a lease for years, was over-ruled by the case in Cro. Jac. 111. and agreed with what *Saunders* said about it in this case.

(10) So Lord *Hale*, (see Mr. *Hargrave's* note (3) to Co. Litt. 44. b.) says, "that if tithes have been usually let to farm, they cannot be leased for life to bind the successor; but they may be leased for 21 years, rendering the ancient rent, and shall bind the successor; adjudged in *Denny's* case; and the rent goes with the reversion." See Bac. Abr. Leases, 352.

be their tenant, and accepted rent, cannot resort again to the defendant and demand the rent of him, as the rule is in *Overton and Sydall's case* (11) 3 Rep. 24. a.

Twyfelen justice said that it is not adjudged in the book (d), that if the lessor accept the rent from the assignee, that the lessor is so bound by it, that he cannot afterwards sue the lessee for it; but the words of the book are "*also it was said.*"

But to this *Saunders* answered, that in the case of *Marsb v. Brace*, Cro. Jac. 334. it is expressly so (e) adjudged.

And thereupon the court said that it was a case of great consequence; for many persons are seised of tithes in fee as of their lay inheritance; and if they lease their tithes reserving rent, and the rent is adjudged to be only a debt by priority of contract, then the heirs, to whom the reversions of such tithes descend, will not have any remedy for rent which shall become due in their own time; and therefore it was worthy of much consideration; and the court seemed to incline that it was a rent which would go with the reversion, and that the assignee would be bound to pay it (12): but it

was

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(d) 3 Rep. 24.
b. Walker's case.

(e) 1 Saund. 240.
Thursby v.
Plant.

(11) See 1 Saund. 241. *Thursby v. Plant*, continuation of note (5).

(12) From the above-cited cases in Cro. Jac. 111. and 1 Ld. Raym. 77. and the opinion of Lord Hale, and also from the inclination which the court discovered to support this as a lease, with all the properties incident to a lease of corporeal hereditaments, it should seem, that a lease for years of tithes was good at the common law, and the rent went along with the reversion, and the assignee of the lease was bound to pay it, and the reversioner might bring an action of debt for the rent against the assignee. However, this point appears to have received a more solemn decision in a subsequent case, where it was held, that a covenant in a lease for years of tithes, made by

the lessee respecting them, should run with the tithes, and bind the assignee of the lessee, and consequently, that an action would lie against him for a breach of such covenant. That was an action of covenant by a rector of a parish against the assignee of his lessee for years of his tithes, who had covenanted for himself, his executors and assigns, not to let any of the farmers of the parish have any part of the tithes without the plaintiff the lessor's consent: and the breach was that the defendant the assignee, after the premises came to him by assignment, let some farmers in the parish have part of the tithes without the plaintiff's consent. After verdict for the plaintiff, it was objected in arrest of judgment, that the action did not lie against the assignee, for it was a mere personal

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was not adjudged, for the plaintiffs' counsel took two objections to the plea. 1. That it is said, that the plaintiffs' being a corporation aggregate, had received rent from the assignee, and accepted him to be their tenant, but it is not shewn that such acceptance is by deed under their common seal, and without that there could be no acceptance; wherefore the plea

personal and collateral covenant binding the lessee only; and that tithes were incorporeal lying in grant, and therefore such a covenant could not run along with them, as it would with lands which lay in livery; and that a rent could not be reserved out of them, for if a lease were made of them by deed for years it was good by way of contract to have an action of debt against the lessee, but the lessor could not distrain; and that the assignee of the tithes was not chargeable with the rent, and consequently the defendant could not be chargeable with breach of covenant in that case. But it was answered and resolved by the court, that the action was maintainable against the assignee; for as to the objection that tithes were incorporeal, and therefore the assignee was not bound, they answered, that tithe was a tenth part of the profits of the land; the profits of the land was the land itself; tithes were tangible and visible, might be put in view in an assize; an ejectment lay for them; a *precipe quod reddat* lay of a portion of tithes, and they were realized by statute 32 H. 8. c. 7. f. 7.; a warranty might be annexed to incorporeal inheritance, and that they had every property of an inheritance in land, except that they lie in grant and not in livery, and Dyer 83. a. b. was cited. And as to the ob-

jection that a lease of tithes was not good, and that the assignee was not chargeable with the rents, they cited the argument of *Saunders* in this case, which they said was an exceeding good one, and with which they concurred, and they also cited Sir T. Raym. 18. *Tippin v. Gover*: and said that debt lay for rent, reserved upon a lease for years of tithes at the common law. 3 Will. 25. *Bulpe v. Wells*.

The statute 32 H. 8. c. 7. f. 7. having put tithes in the hands of lay impropriators upon the same footing with any of their corporeal hereditaments, and turned them, as it were, into lands and tenements, it seems to follow, that since that statute a lease made of tithes by a lay impropriator for years has the same properties, except as to the remedy by distress, as a lease made by him of any of his lands and tenements: and therefore he may bring an action of debt for rent against the assignee of his lessee of tithes in the same manner as he can do against the assignee of a lease of his lands; and the best opinion seems to be, as we have already observed, that ecclesiastical persons might also make a lease of their tithes for years, and the rent would go with the reversion to their successors; but neither lay impropriators nor ecclesiastical persons could make a lease for life. However,

the

plea was insufficient, and so the matter of law would not now come in question, as he concluded.

But to this it was answered that if a deed be necessary it is implied in the plea; for an acceptance being pleaded, every thing that makes it to be a good acceptance is implied, for otherwise it is no acceptance at all; and there are several cases to this purpose. In Plow. Comm. 149 (b). pleading that abbot and convent made a lease for life, without shewing any warrant of attorney under their common seal to make livery (c), is good: so in Cro. Jac. 411. the bailiffs and commonalty of *Ipwich* entitl'd themselves, and did not shew any letter of attorney under their common seal to receive livery, and without such letter of attorney the feoffment could not be good, yet the pleading was ruled to be good enough, because such letter of attorney was implied in the pleading: and so in Cro. Car. 169. (d) an entry for a forfeiture was pleaded to be made by the dean and chapter of *Norwich*, being a corporation aggregate as the plaintiffs are here, and an exception was taken to it that there was no deed or warrant to enter alleged by them to be under their common seal; but the pleading was adjudged good because a sufficient entry shall be intended, and all necessary circumstances are implied (13). And it was further said for the defendant that

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(b) *Throckmerton v. Tracy.*

(c) S. P. Bro.
Pleading 145.
22 Edw. 4. 15. b.
per Tremaine.
8 Rep. 82. b.
Vynior's case.
Cro. Car. 101.
Peto v. Pember-
ton, Doc. Plac.
239.
(d) *Edgar v.*
Sirrell.

a deed

the statute 8 Ann. c. 14. has enabled lay impropiators to make leases of their tithes for life, and to bring debt for the rent; and ecclesiastical persons, as well as some other corporations, are now enabled to do so by statute 5 Geo. 3. c. 17. by which it is enacted, that all leases for one, two or three lives, or any term not exceeding 21 years, of any tithes solely, by any bishop, college, or hall, dean and chapter, precentor, prebendary, hospital, or any other person who is enabled by statute to make leases for one, two or three

lives, or any term of years not exceeding 21, of any lands, tenements, or other corporeal hereditaments, shall be as effectual against the lessors and their successors, as any leases of lands or other corporeal hereditaments made by them; and in case the rent reserved upon such leases shall be in arrear for the space of 28 days after it is payable, they may bring an action of debt against the lessee for such rent, in the same manner, as any landlord can do to recover his rent.

(13) It is also said by Lord Coke, that all necessary circumstances implied by

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3 P. Will. 423,
424. Rex v.
Bigg.

a deed under the plaintiffs' common seal perhaps was not necessary, for a corporation aggregate can do many things without any writing, as retaining servants and the like; see for this 4 H. 7. 6. 13 H. 7. 17. 13 H. 8. 12. But it was not much relied upon, for the court was well satisfied with the former cases that the pleading was good enough in this point.

law in the plea need not be expressed, as in the plea of a feoffment of a manor livery and attornment are implied. Co. Litt. 303. b. S. P. Cro. Eliz. 401. *Ferrers v. Wignall*. So where it is pleaded that land was assigned for dower, it is not necessary to say that it was by *metes and bounds*, for it shall be intended a *lawful* assignment, which is by metes and bounds. Bro. *Pleadings* 145. S. P. Cro. Car. 162. *Kadwallader v. Bryan*. So where a surrender of a lease for years is pleaded, and that it was agreed to by the lessor, it is not necessary to say *that he entered*, for it shall be intended, and it is not usual to plead a re-entry upon a surrender, any more than it is to plead livery upon a feoffment. Cro. Car. 101. *Peto v. Pemerton*. So where it is pleaded that a sheriff made his warrant, it is unnecessary to say that it was *under his seal*, for it could not be his warrant if it were not. Cro. Eliz. 53. *Sheriffs of Norwich v. Bradshaw*. Palm. 357. S. P. So if a man pleads that he is heir to A. he need not say either that A. is dead, or had no son. Dal. 67. See further 1 Leon. 184. *per Coke C. J.* And here it may not be improper to observe, in addition to what has been already submitted to the judgment of the reader in 1 Saund. 233. *Thursby v. Plant*, note (2), that where the certainty of

the lands appears, it is not only unnecessary, but dangerous, to set forth the description of the lands, as they are contained in the deed, under a *per nomen*, as it is called, that is, by the name of all those, &c. describing the parcels as in the deed, for, as it was said in the book, 2 Lutw. 1006. *Rex v. Hungerford*, it will not make a bad plea a good one, though it sometimes makes a plea bad, which without it would have been good. See 1 Roll. Rep. 72. *Farris v. Teaton*. Ibid. 422. *Foraker v. Foraker*. As where in ejectment the plaintiff declared of a lease for years of a house and 30 acres of land in D. *by the name* of his house in D., and 10 acres of land there, *either more or less*, it was moved in arrest of judgment, that 30 acres could not pass by the name of 10 acres, *either more or less*; and so the plaintiff had not conveyed to him 30 acres; for, when 10 acres are leased to him, *either more or less*, these words ought to have a reasonable construction to pass a reasonable quantity, either more or less, and not 20 or 30 acres more, but more or less by a quarter of an acre, or two or three at the most; but if it be three acres less than 10, the lessee must be content with it. Owen. 133. *Day v. Fynn*. Yelv. 166. 1 Brownl. 145. S. P.

The second exception was that the pleading of the acceptance of rent was vitious and insensible; for it is said that the plaintiffs accepted the said rent, to wit, sixpence of the said rent, and accepted the said *John Vaughan* their tenant of the said tithes. *Saunders* answered that it was true that these words, *sixpence of the said rent*, were superfluous and inserted by the mistake of the clerk, but that the sense, omitting those words, was perfect and certain enough; *et utile per inutile non vitiatur*.

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Sed non allocatur, For this fault alone judgment was given against the defendant by *Twyfden*, *Raynsford*, and *Morton* justices, (*Kelynge* chief justice being absent,) who said that the plea in this point was altogether insensible.—But I believe their principal reason was, because they would not determine the matter of law (14).

But in pleading *a grant of a reversion*, it was necessary formerly to allege an attornment, for it was not implied in that case as in that of a *feoffment* of a manor; and even there if the feoffee had avowed on any particular tenant for rent, he must formerly have shewn an attornment. See 8 Rep. 82. b. *Vynior's case*. Yelv. 135. *Appleton v. Doily*. Doc. Plac. 48, 49. 1 Salk 91. *Hudsen v. Jones*. 3 P. Will. 426.

(14) It seems clear that what came after the *scilicet* was superfluous, and

repugnant to the matter precedent, and therefore, according to what was held in *Dakin's case ante*, 291, that which came after the *scilicet* was void and ought to be rejected. In the before-mentioned case out of 3 Will. 31., it was said by the court, that a *trifling objection* was taken to the defendant's plea, which would not be allowed at this time of day, and seemed to agree with *Saunders* that the objection was allowed because the court would not determine the matter of law.

DE

Termino Paschæ,

Anno Regni Regis, Car. II. 23.

Case 51.

Todd *versus* Hastings.

Hil. 22 & 23 Car. 2. Regis. Rot.

1 Vent. 117.

Anon but which seems to be the false case, is contrary. Saying of a draper "you are a cheating fellow, and keep a false book, and I will prove it," not actionable, unless there was some communication concerning the plaintiff's trade, or dealing by way of buying and selling.

ACTION on the case for slanderous words. The plaintiff declares that he was of good fame and credit, and that he was a draper and got his living by buying and selling of cloths and other merchandises, and that the defendant intending to slander him in his good-name and credit spoke to the plaintiff these scandalous words, to wit, "*You are a cheating fellow, and keep a false book, and I will prove it;*" whereby the plaintiff had lost his customers to his damage, &c. On not-guilty pleaded a verdict was found for the plaintiff and damages assessed.

And now it was moved in arrest of judgment that the words are not actionable, because it is not averred in the declaration that the defendant at the time of speaking the words had any communication concerning the plaintiff's trade or dealing by way of buying and selling, and so it does not appear that they were spoken in relation to it, and therefore they do not touch him in his trade. And the keeping of a false book does not imply that the plaintiff had kept a false *debt-book*; for it may be any book which is falsely printed as well as a false *shop-book*; and the words "*cheating fellow,*" do not imply that he cheated in his trade, unless the words had been spoken on a communication concerning it, for perhaps

perhaps the plaintiff may be a cheating fellow at play, or gaming or the like, and not in his dealing. And here the words, being spoken generically without relation to any thing in particular, they cannot be applied to the plaintiff's trade any more than to any other thing (1)

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And of such opinion was the whole court: and the judgment was arrested.

(1) There seems to be no doubt that words which are not actionable in themselves, but are only so because they are spoken of a person in his profession, office, or trade, must be alleged in the declaration to have been spoken of him in relation to such his profession, office, or trade, otherwise the declaration contains no cause of action, and judgment will be arrested; Sir T. Raym. 75. *Hervey v. Martin*. 6 Mod. 202. *W. Moly v. Russell*, per Powell J. 2 Salk. 695 S. C.; and the plaintiff must also prove at the trial that the words were spoken of him in relation to his profession, office, or trade, according to such allegation, otherwise the plaintiff will fail in his action, and be nonsuited; see 1 Saund. 242. a continuation of note (3); but if he avers that he had sustained special damage by reason of the words, as if the plaintiff in the principal case had shown that he had lost some particular customers by name, the declaration would have been good on account of such special damage; and if the plaintiff do in such case recover a sum even less than 40s. he will be entitled to full costs. 1 Saund. 243. b. note (5), 246. note (8).

So where the plaintiff declared that he was a trader, and the defendant said of him, "you are a cheat, and have been a cheat for divers years;" upon

the first motion, Lord Holt said the words must be understood of his way of living, and that it needed no *colloquium*, but afterwards he changed his opinion, and judgment was arrested principally upon the authority of this case. 2 Salk. 694. *Savage v. Robery*. So the words "you cheated the lawyer of his linen, and hood bawd to your daughter to make it up with him, you cheat every body, you cheated me of a sheet, you cheated Mr. Saunders, and I will let him know it," were held not actionable *without a colloquium* of the plaintiff's trade or profession. 2 Str. 1169. *Davies v. Miller*. So the words, "you are a swindler," were held *not* to be actionable unless spoken of a person in a trade or profession, and laid with a *colloquium* of such trade or profession; for the word *swindler* means no more than a *cheat*, which has always been held not to be actionable. 2 H. Black. 531. *Savile v. Jardine*. It is holden that two or more partners may join in an action of slander for words spoken of them in the way of their trade, whether they have sustained special damage or not. 3 Bos. & Pull. 150. *Cook v. Batchelor*, ante 117. a. note. See the form of the declaration. Brownl. Red. 81.

But to say of a *justice of peace*, "he is a forsworn

“forsworn, and not fit to sit upon a bench,” was held actionable without any *colloquium* of his office, for it appears from the words themselves that they were spoken of him in relation to his office. 1 Lev. 280. *Carr v. Osgood*.

Where the declaration consists of several counts, and some of them contain words which are actionable, and some of them words which are not so, and no special damage is laid, if the jury find a verdict for the plaintiff upon all the counts, and give entire damages, judgment will be arrested; for it is certain that the plaintiff ought not to recover all the damages, and the court cannot separate or divide them, and say how much the jury gave upon the counts that were good, and how much upon those that were not so; and therefore, by reason of this uncertainty, it is impossible for the plaintiff to recover any damages at all. 10 Rep. 131. a. *Osborn's case*, 3 Will. 177. *Onslow v. Horne*. But in such case the

jury may give *disjoint* damages upon the separate counts, and then the same difficulty does not occur, and therefore the court may give judgment for the plaintiff upon such of the counts as are actionable. 3 Will. 185.

Where words which are not actionable are laid in the same count with those that are, and the jury give damages generally, the court will reject the insufficient words, and give judgment on those which are actionable, for the insufficient words coupled with those which are actionable are only aggravation. 10 Rep. 130. b. 131. a. 3 Will. 185. And even where the words in the same count are *actionable*, it is not necessary to prove them all; for the rule in actions of this sort seems to be, that the plaintiff need not prove *all* the words laid. Still, however, he is bound to prove so much of them as is sufficient to sustain his cause of action; and it is not enough for him to prove equivalent words of slander. 2 East, 433. *Maitland v. Goldney*.

Dominus Rex *versus* Urlyn.

Case 52.

Trin. 17 Car. 2. Regis. Rot. 66.

URLYN was indicted at the assizes in the county of *Northampton* of common barratry; (1) which indictment being removed into the king's bench by *certiorari*, he appeared and pleaded not-guilty, "and of this he puts himself upon the country, and Sir *Thomas Hansbarw* knt. coroner and attorney

Surplusage shall be rejected in a verdict in an indictment. See 2 Hawk. P. C. 441. f. 10 fol. edit.

of

(1) A barrator is defined to be a common mover, exciter, or maintainer of suits or quarrels in courts of record, or otherwise, as the county court, and the like: or in the country, by taking and keeping possession of lands in controversy—by all kinds of disturbance of the peace,—or by spreading false rumours and calumnies whereby discord and disquiet may grow among neighbours. 8 Rep. 36. b. Co. Litt. 368. a. b. It is held essential to the validity of an indictment for this offence, that it should charge the defendant with being a *common barrator*, which is a term of art appropriated by law to this crime, and cannot be supplied by words which may import as much, such as a common oppressor and disturber of the peace, or a stirrer up of strife among neighbours; 1 Sid. 282. *The King v. Hardwicke*. 6 Mod. 311. *The Queen v. Hannon*; and therefore it seems to follow, that no one can be a barrator in respect of *one* act, for that would not make him a *common* barrator. It seems to be unnecessary to allege in an indictment for this offence any *venue* where it was committed, for, from the nature of the crime, which consists of

the repetition of several acts, it must be supposed to have happened in several places, and therefore it is holden that the trial shall be out of the body of the county. Cro. Eliz. 195. *Parcel's* case. S. P. Cro. Jac. 527. *Palfrey's* case. 1 Hawk. P. C. 244 c. 81. f. 12. & 2 Hawk. P. C. c. 23. f. 61. fol. edit. Barratry is an offence at common law, though the statute 34 Edw. 3. c. 1. directs the mode of punishing it; however, if the indictment concludes *against the form of the statute*, it is good, and these words shall be rejected as surplusage. Cro. Eliz. 148. *Burton's* case. Cro. Car. 340. *Chapman's* case. See 1 Saund. 135. *Rex v. Dickenson*, note (3), pl. 5.; but the indictment must conclude *against the peace*, otherwise it is insufficient. Cro. Jac. 527. *Palfrey's* case. It has been adjudged that justices of peace, *as such*, have, by virtue of the commission of the peace, authority to inquire and hear this offence, without any special commission of oyer and terminer; and therefore in an action for procuring the plaintiff to be indicted as a common barrator before A. B. and C. D. justices of peace, *and also assigned to hear and determine divers*

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the octave of *St. Martin* wheresoever we shall then be in *England*; that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of our realm of *England*, ought to be done. Witness ourself at *Westminster*, on the 20th day of *October* in the 22d year of our reign.

J. Norbury.

The answer of Sir *John Vaughan* kn. the chief justice within named.

The record and proceedings of the plaint whereof mention is within made, with all things concerning the same, I send before our lord the king wheresoever, &c. at the day and place within contained, in a certain record to this writ annexed, as within I am commanded.

J. Vaughan.

Pleas at *Westminster*, before Sir *John Vaughan* kn. and his companions, justices of our lord the king of the bench, of the term of *St. Hilary* in the 21st and 22d years of the reign of our lord *Charles* the second, by the grace of God, of *England, Scotland, France* and *Ireland* king, defender of the faith, and so forth. Roll. 1166.

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Rep. viii.

Warwickshire, to wit. *Amillian Holbech* gent. was summoned to answer *Thomas Bennet* of a plea, wherefore he took the cattle of the said *Thomas*, and unjustly detained them against gages and pledges, &c. And whereupon the said *Thomas* by *Martin Holbech* his attorney complains that the said *Amillian*, on the 14th day of *March* in the 21st year of the reign of our lord the now king, at *Fillough'ey*, in a certain place there called *Filloughley-field*, took the cattle, to wit, one gelding, one mare and two heifers of the said *Thomas*, and unjustly detained them against gages and pledges until, &c. therefore he says that he is injured and has damage to the value of 10*l.* and therefore he brings suit, &c.

Avowry for
reple.

And the said *Amillian* by *Thomas Holbech* his attorney, comes and defends the wrong and injury when, &c., and the said *Amillian* well avows the taking of the said cattle in the said place in which, &c. and justly, &c., because he says that the place in which the taking of the said cattle is supposed to

to be done, doth contain, and at the said time of taking the said cattle did contain, 28 acres, 1 rood, and 21 perches of pasture with the appurtenances in old *Filloughley* aforesaid, which said 28 acres, 1 rood, and 21 perches of pasture with the appurtenances are, and at the said time when, &c., and also from time whereof the memory of man is not to the contrary, were parcel of the manor of old *Filloughley* in the said county; and that long before the said time in which the taking of the said cattle is supposed to be done, the mayor, bailiffs, and commonalty of the city of *Coventry*, and H. M., W. J., J. B., T. P., J. C., T. W., C. O., and G. L., feoffees of and in divers messuages, lands, tenements and hereditaments of and belonging to the hospital or alms-house of *Bablocke* in the said city, were seised of the manor aforesaid with the appurtenances, whereof the said place in which the taking of the said cattle is supposed is, and at the said time of the said taking above supposed to be made was parcel, in their demesne as of fee; and being so seised thereof before the said time when, &c. to wit, on the 11th day of *March* in the year of our Lord 1647, at old *Filloughley* aforesaid, by a certain indenture made between the said mayor, bailiffs and commonalty, and feoffees aforesaid, by the names of the mayor, bailiffs and commonalty of the city of *Coventry*, and H. M. of the same city alderman, late mayor of the same city, W. J. of the same city alderman, J. B. of the same city alderman, T. P. of the same city dyer, J. C. of the same city alderman, J. W. of the same city alderman, C. O. of the same city alderman, and G. L. of the same city alderman, feoffees of and in divers and many messuages, lands, tenements and hereditaments belonging to the hospital or alms-house of *Bablocke* in the same city, of the one part, and one *Thomas Bassett* of the same city alderman and mercer, of the other part, (one part of which said indenture, sealed as well with the common seal of the said mayor, bailiffs and commonalty, as with the seals of the said feoffees, the said *Amillian Holbech* brings here into court, the date whereof is the same day and year aforesaid,) it is witnessed that the mayor, bailiffs and commonalty and the said feoffees, for divers good causes and lawful considerations them thereunto moving, had demised, granted, set and to farm

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HOLBECH.

Locus in quo, &c.
contains 28
acres of pasture.

Parcel of the
manor of F.

of which certain
feoffees were
seised in fee,

and by inden-
ture.

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Proferet thereof.

(1) See post. 319.
note (5).

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HOLBECH.**

Demised the same to T. B.
(2) See ante 305. note (13).
that this long description of the parcels is superfluous and unnecessary; and that the demised premises were sufficiently described before by the words "*the manor aforesaid.*"

farm let, and by the said indenture did demise, grant, set and to farm let to the said *Thomas Bassnet* the manor aforesaid with the appurtenances whereof, &c. by the name (2) of all that scite and manor-place of old *Filloughley* in the county of *Warwick*; called old *Filloughley Hall* with the appurtenances in old *Filloughley* and new *Filloughley*, in the said county of *Warwick*; and all houses, barns, stables, buildings, gardens and orchards thereunto belonging and appertaining, and all meadows, pastures, lands, tenements and closes in the said indenture thereafter mentioned, that is to say, one close or pasture called the stocking divided into two parts, the greater part of which said close containing 16 acres and one quarter of an acre, and the less part thereof containing 3 acres, 2 roods, and 20 perches; the walnut-tree yard and the barley-piece containing together 5 acres and 1 rood; one close, adjoining to the said close called the stocking-close, called the cunney-green close containing 5 acres, 2 roods, and 20 perches; one meadow called the barn meadow, containing seven acres and the half of one acre; a close called the jamballs, to be divided into three parts containing 17 acres, one rood, and 14 perches; one croft called priestcroft, containing 5 acres and 1 rood; a close called the chapel field divided into two parts, the greater part of the said close called the chapel-field, near a house called white-house, containing 10 acres and 20 perches, and the other part thereof near a certain field called barley-field, containing 8 acres, 3 roods and 8 perches; and certain pasture and meadow lands there called *Filloughley-field* and *Filloughley-field* meadow, divided as follows; great *Filloughley-field* containing 28 acres, 3 roods and 21 perches; long-field adjoining containing 16 acres and 1 rood; the field adjoining the field called long-field and the meadow called *Filloughley* meadow, containing 10 acres and 1 rood; little-field adjoining containing 4 acres; a certain field called *Filloughley* field near a fish-pond, abutting on the west on a certain field called church-field meadow, containing 15 acres, 3 roods and 20 perches; a field at the top of the privy adjoining the fish-pond and long-field, containing 16 acres, 1 rood and 16 perches, and a meadow called *Filloughley* meadow, containing 26 acres, 3 roods and 33 perches; all which premises

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premises are parcel of the said farm called old *Filloughley* farm, and all their part, portion and property of the wood-field there called burchley-hay, containing 63 acres, 3 roods and 19 perches, with the herbage and feedings in the same, and all the woods, underwoods with the profits thereof growing and being in the said place called burchley-hay, and all waters, pools, stews, fishes and fisheries in or upon the premises, or any parcel thereof, and all and singular the chief rents and profits of the courts in old *Filloughley* afore said called *Aspath* and *Corley* in the said county of *Warwick*, appertaining to the said manor as parcel thereof, together with all advantages and profits thereunto belonging, with all and singular their and every of their appurtenances; excepting and always reserving out of the said demise to the said H. M., W. J., J. B., T. P., J. C., T. W., C. O., and G. L., their heirs and assigns, all large timber and timber trees growing and being in and upon the premises or any parcel thereof, with free liberty of ingress, egress and regress at all convenient times at their will and pleasures to fell, take and carry away the same with waggons and carts, and to make saw-pits in apt and convenient places on the premises for the sawing and breaking of any timber trees which should be felled in and upon the premises or any part thereof; and also excepting and always reserving full and free liberty of ingress, egress and regress in, to, and from the premises for keeping and holding the courts yearly there; and further the said feoffees for the consideration afore said did by the said indenture demise, grant, set and to farm let to the said *Thomas Bassnet* all issues, fines, amerciements, forfeitures, goods waived, goods and chattels strayed, and other perquisites and profits whatsoever arising, coming and growing from the court-leet holden within the manor or village of old *Filloughley* afore said, during the term of years thereafter granted by the said indenture: To have and to hold the site, manor-place, tenements and other the premises afore said with their appurtenances, except as before excepted, to the said *Thomas Bassnet* his executors and assigns, from the feast of the Annunciation of the blessed Virgin, *Mary* next following the date of the said indenture, for and during and to the end and term of 21 years thence next following and fully to be complete

Halendum for
21 years.

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Redendum 66l.
13s. 4d. at
Michaelmas and
Lady-day.

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who entered and
was possessed ;

and assigned the
said term to the
defendant by in-
denture ;

Profert.

(1) See post. 319.
note (5).

who was possess-
ed for the residue
of the term,

plete and ended ; yielding and paying therefor yearly during the said term of 21 years to the said H. M., W. J., O. B., T. P., J. C., T. W., C. O., and G. L., their heirs and assigns the sum or yearly rent of 66l. 13s. 4d. of lawful money of *England*, to be paid at the two usual feasts or days of payment in the year, that is to say, at the feast of St. *Michael* the archangel and the Annunciation of the blessed Virgin *Mary*, by even and equal portions. By virtue of which demise, the said *Thomas Bassnet* afterwards and before the said time when, &c. to wit, on the 27th day of *March* in the year of our Lord 1648, entered into the said manor and tenements aforeaid with the appurtenances, and was possessed thereof ; and the said *Thomas Bassnet* being so possessed thereof, the said *Thomas Bassnet* afterwards and before the time when the taking of the said cattle was made, to wit, on the 1st day of *October* in the 12th year of the reign of our lord the now king, at old *Filloughley* aforeaid, by a certain indenture between the said *Thomas Bassnet*, by the name of *Thomas Bassnet* of the city of *Coventry* alderman, of the one part, and the said *Amillian*, by the name of *Amillian Holbech* of old *Filloughley* in the county of *Warwick* gent., of the other part, (one part of which said indenture sealed with the seal of the said *Thomas Bassnet*, the said *Amillian* brings here into court the date whereof is the same day and year aforeaid,) *it is witnessed*, that the said *Thomas Bassnet*, for and in consideration of 130l. of lawful money of *England*, had granted, bargained, sold, assigned and set over, and by the said last-mentioned indenture did grant, bargain, sell and assign and set over to the said *Amillian* his executors, administrators and assigns, as well all and singular the manor, messuages, lands and tenements, thing and things aforeaid with their appurtenances, as in the said recited indenture of demise, and all his right, estate, title, interest and term of years, which he then had to come, of and in the manor and tenements aforeaid with the appurtenances by virtue of the said demise ; by force of which said grant and assignment the said *Amillian* was possessed of the manor and tenements aforeaid with the appurtenances whereof, &c. for the residue of the said term of 21 years then to come, and fully to be complete and ended. And the said

Amillian

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Amillian being so possessed thereof, the said *Amillian* afterwards and before the said time of taking the said cattle, to wit, on the 1st day of *November* in the 18th year of the reign of our lord the now king, at old *Filloughley* afore said, demised, and to farm let to the said *Thomas* the said 28 acres, one rood and 21 perches of pasture with the appurtenances, called *Filloughley* field in old *Filloughley* afore said, being part of the manor and tenements afore said above assigned in which, &c. to have and to hold to the said *Thomas Bennet* and his assigns for one whole year, beginning from the feast of the Annunciation of the blessed Virgin *Mary* then last past and fully to be complete and ended, and so afterwards as long as the said *Amillian* and *Thomas Bennet* should please; yielding and paying therefore to the said *Amillian* and his assigns the yearly rent of 10l. and 10s. of lawful money of *England*, payable yearly at the two most usual feasts or terms in the year, namely, at the feast of St. *Michael* the archangel, and the Annunciation of the blessed Virgin *Mary*, by equal portions; by virtue of which said demise the said *Thomas Bennet* afterwards and before the said time when, &c. to wit, on the 2d day of *November* in the 18th year afore said, entered into the said 28 acres, 1 rood and 21 perches of pasture, and was possessed thereof, and being so possessed thereof, the said *Thomas Bennet* had and occupied the said 28 acres, 1 rood and 21 perches of pasture with the appurtenances, in which, &c. for two whole years and the half of one year, ended on the feast of St. *Michael* the archangel in the 20th year of the reign of our said lord the now king. And because 5l. 5s. of the rent afore said for the half of a year ended at the last mentioned feast, were in arrear and unpaid to the said *Amillian*, he the said *Amillian* well avows the taking of the said cattle in the said place in which, &c. and justly, &c. for the said 5l. 5s. and being in form afore said in arrear to the said *Amillian*, &c. (3).

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and demised the
locus in quo, &c.
parcel, &c. to
the plaintiff
from year to
year at the rent
of 10l. 10s.
payable at Mi-
chaelmas and
Lady-day;

by virtue where-
of plaintiff
entered and was
possessed,

and occupied the
premises for two
years and half;
and because half
a year's rent was
in arrear to de-
fendant he avows
the taking, &c.

(3) This is another instance to shew the necessity the defendant was under at the common law of deducing his title in the avowry to the premises, which the plaintiff was tenant of to

him; see ante, 284, note (3); and the exceptions hereafter taken to it by Lord *Hale*, prove how dangerous a special avowry was.

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HOLBECH.

Plea in bar that
the defendant
did not demise
the premises to
the plaintiff.
(c) These words
in italics should
have been omit-
ted.

See post. 339.
note (6).

And the said *Thomas Bennet* says that the said *Amillian*, by reason of any thing before alleged, ought not to avow the taking of the said cattle in the said place in which, &c. to be just, because he says that the said *Amillian on the said 1st day (c) of November in the 18th year aforesaid, at old Filloughley aforesaid, did not demise or to farm let to the said Thomas Bennet the said 28 acres, 1 rood and 21 perches of pasture, with the appurtenances, called Filloughley field in old Filloughley aforesaid, yielding and paying therefore to the said Amillian and his assigns the yearly rent of 1*l.* 10*s.* of lawful money of England in manner and form as the said Amillian hath in his said avowry above in pleading alleged; and this he is ready to verify; wherefore inasmuch as the said Amillian has above acknowledged the taking of the said cattle in the said place in which, &c. he the said Thomas Bennet prays judgment, and his damages by reason of the taking and unjustly detaining of the said cattle to be adjudged to him, &c.*

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Replication
takes issue upon
it.

And the said *Amillian*, as before, says that he the said *Amillian on the said 1st day (c) of November in the 18th year aforesaid, at old Filloughley aforesaid, did demise and to farm let to the said Thomas Bennet the said 28 acres, 1 rood and 21 perches of pasture with the appurtenances, called Filloughley field in old Filloughley aforesaid, yielding and paying therefore to the said Amillian and his assigns the yearly rent of 1*l.* 10*s.* of lawful money of England in manner and form as he hath in his said avowry above in pleading alleged, and of this he puts himself upon the country; and the said Thomas Bennet likewise, &c. Therefore the sheriff is commanded that he cause to come here on the octave of the Purification of the blessed *Mary* 12, &c. by whom, &c. and who neither, &c. to recognise, &c. because as well, &c. At which day the jury between the said parties in the said plea is put here thereof in respite between them until this day, to wit, in 15 days from the day of *Easter* then next following, unless the justices of our lord the king assigned to take the assizes in the said county according to the form of the statute, &c. shall first come on *Wednesday* the 9th day of *March* next following at *Warwick* in the said county. And now here at this day comes the said *Thomas* by his said attorney, and the said jus-*

Verdict awarded.

Jurats.

Nisi prius.

tices of assize before whom, &c. sent here their record in these words; Afterwards, on the day and at the place within contained, before Sir *Thomas Tyrrell* knt. one of the justices of our lord the king of the bench, justice of our lord the king assigned to take the assizes in the said county of *Warwick*, *Anthony Farrington* being for this time associated to the said Sir *Thomas Tyrrell* according to the form of the statute, &c. come as well the within-named *Thomas Bennet*, as the within-named *Amillian Holbech* gent. by their attornies within contained; and the jurors of the jury, whereof mention is within made, being summoned, likewise come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, say upon their oath that the said within-named *Amillian* on the 1st day (c) of November in the 18th year within mentioned, at old *Filloughley* within written, did not demise or to farm let to the said *Thomas Bennet* the within-mentioned 28 acres, 1 rood and 21 perches of pastures with the appurtenances called *Filloughley* field in old *Filloughley* within written, yielding and paying to the said *Amillian* and his assigns the yearly rent of 10l. 10s. of lawful money of *England*, in manner and form as the said *Amillian* has within in his avowry within mentioned in pleading alleged: and they assess the damages of the said *Thomas Bennet* by reason of the taking and unjustly detaining of the cattle within specified, over and above his costs and charges by him about his suit in this behalf expended, to 6d. and for these costs and charges to 53 shillings and four-pence. Therefore it is considered that the said *Thomas Bennet* do recover against the said *Amillian* his said damages to 53s. 4d. by the jurors aforesaid in form aforesaid assessed, and also 6l. 16s. 2d., for his said costs and charges by the court here adjudged of increase to the said *Thomas* with his assent; which said damages in the whole amount to 9l. 10s., and the said *Amillian* in mercy, &c.

Afterwards, to wit, on *Monday* next after 15 days of *St. Martin* in this same term, before our lord the king at *Westminster* comes the said *Amillian Holbech* by *William Walker* his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it ap-

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HOLBECH.

Postea.

Verdict for the
plaintiff.

Judgment.

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Costs de incre-
mento.

Assignment of
general error in
K. B.

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HOLBECH.

Award of *scire
facias ad audi-
endum errores.*

Sheriff returns
scire feci.

Defendant ap-
pears.

In writ of error

pears, that the judgment aforesaid was given for the said *Thomas Bennet* against the said *Amillian Holbeck*, whereas by the law of the land, the said judgment ought to have been given for the said *Amillian Holbeck* against the said *Thomas Bennet*; therefore in that there is manifest error. And the said *Amillian Holbeck* prays the writ of our said lord the king to warn the said *Thomas Bennet* to be before our said lord the king to hear the record and proceedings aforesaid; and it is granted to him &c., whereupon it is commanded to the sheriff of the said county of *Warwick*, that by good and lawful men of his bailiwick, he make known to the said *Thomas Bennet* that he be before our said lord the king in eight days of *St. Hilary* wheresoever &c., to hear the record and proceedings aforesaid, if &c., and further &c. the same day is given to the said *Amillian* &c. At which day, before our said lord the king at *Westminster* comes the said *Amillian* by his said attorney, and the sheriff of *Warwickshire* aforesaid, to wit, *Francis Willoughby* esq. returns that, by virtue of the said writ to him directed, he hath by T. B. and J. T. good &c., caused it to be made known to the said *Thomas Bennet* that he be before our lord the king at the time and place in the said writ mentioned to hear the record and proceedings aforesaid, if &c., as by the said writ he was commanded &c., which said *Thomas* according to the said warning made in this behalf comes by *Charles Ballett* his attorney; whereupon the said *Amillian* as before says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, by alleging the said error by him in form aforesaid alleged; and he prays that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, and that the said *Thomas* may rejoin to the said error. And he prays that the court of our said lord the king here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error. And the said *Thomas Bennet* says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he

he likewise prays that the court of our said lord the king here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned and alleged for error, and that the said judgment may in all things be affirmed. And because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the said parties before our said lord the king until wheresoever &c. to hear their judgment thereon, because the court of our said lord the king here is thereof not yet advised &c.

Creswel Levins.

BENNET *v.*
HOLBECH.

*Curia advisare
vult.*

Bennett *versus* Holbech.

Case 53.

Mich. 22 Car. 2. Regis. Rot. 670.

ERROR brought by *Holbech* against *Bennet* on a judgment in the common bench, where *Bennet* was plaintiff against the said *Holbech* defendant, and declared in replevin for taking his cattle in *Filloughley* field in *Filloughley* in the county of *Warwick*; the defendant *Holbech* avowed and said that the place in which &c., from time whereof &c., was parcel of the manor of old *Filloughley*, and that before the time when &c., the mayor, bailiffs and commonalty of the city of *Conventry*, and one *Million* and others were seised of the said manor whereof &c., in their demesne as of fee; and being so seised by a certain indenture made between the said mayor, bailiffs, and commonalty, and the said *Million* and the others of the one part, and one *Bassnet* of the other part, it is witnessed (c), that the said corporation, and the natural persons had demised to *Bassnet* the manor aforesaid, whereof &c. to have for 21 years; by virtue whereof *Bassnet* entered and was possessed, and being so possessed by a certain indenture, it is witnessed, that he assigned over all his term to *Holbech* the avowant, whereby he entered and was possessed; and being so possessed, afterwards, to wit, on the first day of *November* in the 18th year of the reign of the now king, at old *Filloughley* aforesaid,

S. C. 2 Lev. 11.
2 Keb. 750.
769, 789, 825.
If the day and
place be made
parcel of the
issue where it
ought not to be,
it is aided by
the statute
32 H. 8. c. 30.
or jeofails.

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he demised the said place in which &c. to *Bennet* the plaintiff, to have for a year and further at will, rendering rent, and for so much rent in arrear he avowed the taking of the said cattle, &c.—The plaintiff pleaded in bar to the avowry, that the said avowant *on the said first day of November in the said 18th year of the reign of the now king, at old Filloughley aforesaid*, did not demise to him in manner and form as the avowant has alleged. And this &c., wherefore &c.; and so the plaintiff made the day and place of the demise to be parcel of the issue. The avowant replied *that, on the said first day of November in the said 18th year of the reign of the now king, at old Filloughley aforesaid*, he did demise to the plaintiff in manner and form as &c., and of this he puts himself upon the country, and the plaintiff likewise. And the jury found that the within-mentioned avowant, *on the first day of November in the 18th year within written, at old Filloughley aforesaid*, did not demise &c. in manner and form as the avowant has alleged, and assessed damages and costs for the plaintiff; wherefore he had judgment in the common bench.

And it was assigned for error, that judgment ought not to have been given for the plaintiff in the common bench on this issue and verdict, because the day and place of the demise is made parcel of the issue, and the jury have found that the avowant did not demise *on the same day and at the same place*; which is a negative pregnant; for it implies that the avowant *had demised*, but not on the day or at the place mentioned in the declaration, and so the substance and merits of the cause are not tried; and it was the plaintiff's own fault in his bar to the avowry; and the case of *Sandback v. Turvey*, Cro. Jac. 585, and other cases were cited.

And on the other side it was urged, that here is an issue, and a verdict, which is aided by the statute of jeofails, 32 H. 8. c. 30. which enacts, “ that if any issue be tried by the oath of 12 or more indifferent men for the party, plaintiff, or demandant, or for the party, tenant, or defendant, in any manner of action or suit at the common law of this realm, in any of the king's courts of record, that then the justice and justices by whom judgment thereof ought to be given, shall proceed and give judgment in the same, any mispleading, lack of

of colour, insufficient pleading or jeofail, any miscontinuance or discontinuance, misconveying of process, mis-joining of the issue, lack of warrant of attorney of the party against whom the same issue shall happen to be tried, or any other default or negligence of any of the parties, their counsellors or attornies, had or made to the contrary notwithstanding; and the same judgment shall stand without any reversal &c." And here is a mis-joining of the issue, which is aided by the express words of the statute; and the cases in Moor 695. (b) Cro. Jac. 251. (c) Cro. Car. 78. (d), and others were cited. And it was further urged that if the avowant in the common bench had given evidence of any lease made by him, though it was on another day, the judge of assize would have assisted him by finding it specially, or over-ruling the evidence and directing the jury that the day or place was not material.

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(b) Bishop v.
Gyn.
(c) Hooker v.
Evans.
(d) Purcase v.
Jegon.

Hale chief-justice took two exceptions to the avowry, namely, 1. That the avowant alleges that the corporation of Coventry, and one Million and others, natural persons, were seised jointly in fee of the manor whereof &c., whereas a natural person and a corporation cannot be jointenants, or jointly seised of any lands; see Litt. f. 297. (4). 2. That the avowant has not laid the lease to Bassnet by an express averment in fact, but by a *testatum existit*, which is not good (5) pleading, and therefore the avowry was bad; which was

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A corporation
and a natural
person cannot be
jointenants.

A lease must be
averred to be
made, not laid by
a *testatum existit*.

(4) For though the words of the gift or grant are joint, yet the law adjudges the donees to be seised in *several* rights as tenants in common, in respect of their *several* capacities; bodies natural being seised to them and *their heirs*, and bodies corporate to them *and their successors*: and besides, one of the properties of a jointenancy, namely, a mutual chance of survivorship, cannot take place between them, for a corporation never dies; see Co. Litt. 190 a.

nessed by the indenture that a lease was granted to Bassnet, is not a direct allegation *that it was granted* to him, but only an affirmation that the indenture says so; whereas, according to the rules of good pleading, the party himself ought to allege that a matter contained in the indenture was done, and not say that *the indenture alleges* it was done; Plow. 143. a. *Browning v. Besson*. See 1 Saund. 274. *The King v. Sutton*, note (1), and the authorities cited, and distinction taken in it.

(5) Because to say *that it is wit-*

BENNET *v.* granted by the whole court; and the court took time to advise
 HOLBECH. upon it.

And it was moved that here the court ought to reverse the judgment and award a repleader, and the parties should replead here in this court; for it was urged that they ought to make the same award and give the same judgment that the common bench ought to have done. 1 Roll. Abr. 774. (D.) pl. 1, 2, 3. And afterwards at another day the court delivered their opinion; and *Hale* chief-justice was of opinion that the issue and verdict were aided by the statute of jeofails (6); but *Twyssden* justice *contra*, that it was not aided by any statute

(6) The plea in bar it seems should have been that "*he did not demise in manner and form as, &c.*" and the issue, "*that he did demise, &c.*" omitting the day and place of the demise; for evidence of a demise on any other day, or at any other place, would have maintained the avowry just as well as on the day and at the place mentioned in it, being both of them immaterial to the validity of the demise. 2 Lev. 11. *Holbech v. Bennet*. When a material allegation is traversed in an improper or inartificial manner, the issue taken upon it is merely an informal one, which is held to be aided after verdict whether for the plaintiff or defendant, by the before-mentioned statute 32 H. 8 c. 30 Gilb. H. C. P. 147 3d edit. In the principal case it appears to be an informal issue, occasioned by traversing a material allegation, that is, the demise in the avowry in an improper manner, and therefore there seems to be no doubt that, according to Lord *Hale's* opinion, the issue was cured after verdict by the said statute of jeofails. And supposing the plea in bar made the issue to be a negative-pregnant, as was contended, which would

have been had on demurrer, yet being only an error in phrase, it would have been good after verdict. Gilb. H. C. P. 153. As where in trespass for entering the plaintiff's house, the defendant pleads the plaintiff's daughter licensed him to enter, and the plaintiff replies that he did not enter *per licentiam suam*, though this replication is a negative-pregnant, it is good after verdict. Cro. Jac. 87. *Myn v. Cole*. So where, to an avowry for 120*l.* rent in arrear, the plaintiff pleaded "that the said 120*l.* was not due," and the defendant joined issue thereon; at the trial it appeared that 24*l.* only was due; upon which the plaintiff objected that the evidence did not support the issue joined by the defendant; yet it was holden, notwithstanding the objection was made at the trial, and the point reserved, that the verdict for 24*l.* cured the defect in the formality of the issue. 3 Bos. & Pull. 348. *Cobb v. Brian*. Besides which, this may be said to be a mis-joining of the issue, and so within the words of the statute.

So where, to an issue tendered by the plaintiff, the defendant joins the *similiter* by the plaintiff's name, or the plaintiff

statute of jeofails. And *Hale* said that in ancient time it was usual to award a repleader on a writ of error in this court, and that he had perused several ancient rolls, namely, Tr. 21. Edw. 1. Roll. 38. Tr. 9 Edw. 3. Roll. Mich. 8. Edw. 2. Roll. 59. Tr. 11 Edw. 3. Roll. 75. Mich. 16 Edw. 3. Roll. 22. Tr. 27 Edw. 3. Roll. 21. Hil. 33 Edw. 3. Roll. 79. in

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til joins it by the defendant's name, this defect is aided after verdict, there being an affirmative and negative before. 1 Roll. Abr. 200. pl. 27. 30. Cro. Jac. 587. *Thomas v. Willoughby*. Skin. 591. *Greenwood v. Piggon*. 8 Rep. 161. b *Blackmore's case*. Gilb. H. C. P. 161. 1 Str. 551. *Rawbone v. Hickman*. It was once holden that the want of a *similiter* was not aided or amendable after verdict; 1 Str. 641. *Cooper v. Spencer*. 8 Mod. 376. S. C.; and where, in the *similiter*, the defendant's name was put instead of the plaintiff's, *Lee* chief justice dismissed the jury, conceiving he had no commission to try the issue. 2 Str. 1117. *Heath v. Walker*. But in a subsequent case, where a similar mistake was made, the court after trial of the issue refused to arrest the judgment. 3 Burr. 1793. *Harvey v. Peake*. And at length the *similiter* was allowed to be inserted after verdict, instead of &c. upon three grounds, first, that it was an omission of the clerk; secondly, that it was implied in the &c. added to the last pleading; and thirdly, that by amending, the court only made *that* right, which the defendant himself understood to be so by his going down to trial. Cowp. 407. *Sayer v. Pocock*. So where to debt on bond the defendant pleaded payment on the 14th of June in the 11th

of *James*, and the plaintiff replied that he did not pay on the 14th of August in the 11th year aforesaid, and so mistook the month, and verdict for the plaintiff; this mistake was held to be aided by the verdict by the 32 H. 8. c. 30. Cro. Jac. 510. *Hall v. Bouythan*. So if the defendant pleads *not guilty* instead of *non assumpsit*. Cro. Eliz. 470. *Corbyn v. Brown*. All. 77. *Cornish v. Cawsey*. 2 Salk. 734, 735. *Coggs v. Barnard*. 2 Str. 1022. *Marshall v. Gibbs*: or *nil debet* for *nil detinet*. All. 76; these defects are good after verdict, though bad on demurrer. And the statute 4 Ann. c. 16. has extended the benefit of the several statutes of jeofails to judgments by default.

But a verdict does not help an immaterial issue. Carth. 371. *Jones v. Bodinner*. 2 Mod. 137. *Teeck v. Hill*. An immaterial issue is, where a material allegation in the pleadings is not traversed; but an issue is taken on some point that will not determine the merits of the cause, and the court is often at a loss for which of the parties to give judgment. Gilb. H. C. P. 147. 1 Lev. 32. *Sirjeant v. Fairfax*. As where in debt on bond conditioned for the payment of 105l. the defendant pleads payment of 100l. according to the form and effect of the condition, the plaintiff replies that he did not pay the 105l., and

BENNET v. HOLBECH. in which a repleader is so awarded, but it is obsolete, and not in use at this day. And in the case at bar the judgment could not be reversed for the faults in the avowry; and perhaps, he said, the plaintiff had made his plea in bar bad on purpose to induce the avowant to demur to it, because the avowry was insufficient; and judgment ought to be for the plaintiff for the insufficiency of the avowry, for the declaration is good; and so the judgment was affirmed, although it was prayed that it should be reversed, and the avowant restored to his action. *Levinz* with the plaintiff in the writ of error; and *Saunders* with the defendant.

and verdict that he did not pay the said 105l.: this is an immaterial issue not aided by the verdict, for the plaintiff has not traversed the same payment that is in the defendant's plea. Cro. Jac. 585. *Sandback v. Turvey*. So where in trespass the defendant pleaded in bar an award made between the plaintiff and J. S. of the one part, and the defendant and several others, naming them, of the other part, that the defendant should pay to the plaintiff and J. S. so much in satisfaction of the trespass, which he paid: the plaintiff replied that there was no such award *between the plaintiff and defendant* as the plaintiff has alleged, and on issue joined and verdict for the plaintiff, it was held, that he should not have judgment, because the plaintiff did not traverse the same award that was set out in the defendant's plea, but put another award in issue between the plaintiff and defendant only, which was not alleged in the plea. 1 Roll. Rep. 85. *Carpenter v. Starr*. So where in debt on bond conditioned for the payment of 60l. on the 25th of June, the defendant pleads payment on the 20th of June, according to the form and effect of the con-

dition, and issue is joined, and the verdict found *that he did not pay 60l. on the 20th*; it was held that the plaintiff should not have judgment, for the issue was out of the matter of the condition and therefore void: and the money might have been paid the 25th, though it was not paid the 20th; so it did not appear that the condition was broken, and it is not aided by the statute 32 H. 8. c. 30. Cro. Jac. 414. *Holms v. Broket*. See 1 Saund. 228. *Stennel v. Hogg*, note (1). 2 Mod. 139. *Read v. Dawson* 2 Str. 847. *Enys v. Mobun*.

Where the issue is immaterial, the court will award a repleader; respecting which, the following rules were laid down by the court, in the case of *Staple and Haydon*. 2 Stalk. 579. 6 Mod. 1. 2 Ld. Raym. 922. First, that at common law a repleader was allowed before trial, because a verdict did not cure an immaterial issue; but now a repleader ought never to be allowed till trial; because the fault of the issue may be helped after verdict by the statute of jeofails. Secondly, that if a repleader be denied where it should be granted, or granted where it should be denied, it is error. Thirdly, that the judgment

of replader is general, namely, *that the parties should replead*; and the parties must begin again at the first fault which occasioned the immaterial issue. 1 Ld. Raym. 169 Thus, if the declaration is ill, and the plea and replication are also ill, the parties must begin *de novo*; but if the plea is good and the replication ill, at the replication. Fourthly, no costs are allowed on either side. Fifthly, that a replader cannot be awarded after a default at *nisi prius*. To which it may be added, that a replader cannot be awarded after a demurrer, or writ of error, but only after issue joined; and it is not grantable in favour of the person who made the first fault in pleading. * Tidd's Prac. K. B. 824.

In the present case it seems, if the

issue had not been aided, the plaintiff would have been entitled to judgment; because, as the avowant claimed the premises by means of a joint demise made by a corporation and natural persons, who could not by law join in making such demise, his title was defective, and his avowry of course bad; and therefore the plaintiff's declaration not being answered, he was entitled to judgment. For the plaintiff's declaration must have all essentials necessary to support the action, and the defendant's plea must be essentially good; and if the gist of the plea be bad, it cannot be cured by a verdict found for the defendant; but if it be found for the plaintiff, he shall have judgment either for the badness or falsehood of the plea. Gilb. H. C. P. 140.

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Case 54.

Hil. 22 & 23 Car. 2. Regis. Rot. 233.

CORNWALL, to wit. Robert Robins gentleman, Roger Mould, Robert Ellery, and Edye Darwe were summoned to answer Oliver Hoskins of a plea, wherefore they took the cattle of the said Oliver, and unjustly detained them against sureties and pledges &c. And whereupon the said Oliver by Richard Halse his attorney complains that the said Robert, Roger, Robert and Edye, on the 26th day of August in the 22d year of the reign of our lord Charles the 2d now king of England &c., in certain places called *Emlands-kercedown* and *Lady Moore*, within the several parishes of *St. Brewer* otherwise *Symonward*, and *Blisland* in the said county, took the cattle of the said Oliver, to wit, sixteen oxen of the price

Declaration in
replevin.

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ROBINS
& al'.

Cognizance,
taking the cattle
damage-feasant.

price (1) of 4l. each; 14 steers of the price of 40s. each; 3 cows of the price of 3l. each; 12 heifers of the price of 3l. each; one bull of the price of 40s. and 3 calves of the price of 5s. each; and unjustly detained them against sureties and pledges until &c.

And the said *Robert Robins, Roger Mould, Robert Ellery* and *Edye Darve* by *Edward Hoblin* their attorney come and defend the wrong and injury when &c. And as bailiffs of *Gabriel Barker* doctor of physic, and *Lettice Thistlethwaite* spinster, well acknowledge the taking of the said cattle in the said places in which &c., and justly, &c. because they say, that the said places in which the taking of the said cattle is above supposed to be done, called *Emlands-kercedown* and *Lady Moore*, do contain, and also, at the said time when the taking of the said cattle is above supposed to be done, did contain 500 acres of land, and 500 acres of moor with the appurtenances within the said several parishes of *St. Brewer* otherwise *Symonward* and *Blisland* in the said county, which said 500 acres of land, and 500 acres of the moor are, and also from time whereof the memory of man is not to the contrary were, parcel of the manor of *Blisland* in the said county, of which said manor with the appurtenances the said *Gabriel Barker* and *Lettice Thistlethwaite*, long before the time when the taking of the said cattle is above supposed to be done in the said places in which &c., and also at the said time when &c., were seised in their *demesne* (2) *as of fee*: and because the said cattle at the said time when &c. were in the said places in which &c. eating up the grafs of the said *Gabriel* and *Lettice* lately there growing, and doing damage there, they the said *Robert, Roger, Robert* and *Edye* as bailiffs (3) of the said *Gabriel* and *Lettice* at the said time when &c., well acknowledge the taking of

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(2) See 1 Saund.
347 d. Potter
v. North,
note (6).

(3) See 1 Saund.
347. c. note (4)

(1) It is not usual to insert the price of the cattle or goods taken, in a declaration in replevin; Co. Ent. 572. a. 573. a. 573. b. 575. a. Clift. 640. 654. Lib. Plac. 266. Hanf. Ent. 200. Brownl. Red. 414. 415. 419. 421. 425. 427. 429 Lill. Ent. 349. 357. 359. 363. ante, 194. 203. 310. 1 Saund. 187.

347; and the reason seems to be, because if the plaintiff obtains a verdict, he is only entitled to damages for the wrongful taking and costs, but not to the value of the goods taken, as he is in trespass, for they were delivered to him when replevied.

the said cattle in the said places in which &c., and justly &c., so doing damage there. And this they are ready to verify; wherefore they pray judgment and a return of the said cattle together with their damages, costs and charges by them about their suit in this behalf expended, according to the form of the statute to be adjudged to them &c.

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& al'.

And the said *Oliver Hoskins* says that the said *Robert Robins*, *Roger Mould*, *Robert Ellery* and *Edye Darwe*, by reason of any thing before alleged ought not, as bailiffs of the said *Gabriel Barker* and *Lettice Thistlethwaite*, to acknowledge the taking of the said cattle in the said places in which &c. to be just, because he says that within the said manor of *Blisland* there now are, and from time whereof the memory of man is not to the contrary were, divers customary tenements parcel of the said manor, and demised and demisable by copy of the rolls of the court of the said manor at the will (4) of the lord of the said manor for the time being, according to the custom of the said manor: and that within the said manor there is, and for all the time whereof the memory of man is not to the contrary there was, such a custom, (5) that all the customary tenants of the customary tenements of the said manor of *Blisland* have had, and been used and accustomed to have, the sole and several pasture in the said places called *Emlands-kercedown*, and *Lady Moore* in which &c. yearly and every year for the whole year at their will and pleasure as belonging to their said customary tenements (6). And the said *Oliver* further says, that the said customary tenants of the said customary tenements parcel of the said manor afterwards, and before the said time of taking the said cattle, to wit, on the 20th day of *August* in the said 22d year of the reign of our said lord the now king, at *Blisland* aforesaid, gave licence to the said *Oliver* to put the said cattle into the said places in which &c.; by virtue of which said licence the said *Oliver* afterwards, and before the said time of the taking of the said cattle, put the said cattle into the said places in which, &c. to depasture the grafs there then growing: which said cattle were in the said places in which, &c. depasturing the grafs there then growing until the said *Robert Robins*, *Roger Mould*, *Robert Ellery* and *Edye Darwe* afterwards, to wit, on the said 26th day of *August* in the said


Plea in bar.

That there are several copyholders of the manor.

(4) See 1 Saund. 348. notes (8, 9.)

(5) See 1 Saund. 348. note (11) That there is custom within the manor for the copyholders to have the sole and several pasture of the places in which, &c. for the whole year

(6) See 1 Saund. 349, note (12). Who gave plaintiff leave to put his cattle into the places in which, &c.

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faid 22d year of the reign of our faid lord the now king, took the faid cattle in the faid places in which &c. called *Emlands-kercedown* and *Lady Moore* in the faid several parishes of *St. Brewer*, otherwise *Symonward* and *Blisland* aforefaid, and unjustly detained them against sureties and pledges until &c. as the faid *Oliver* above thereof complains against him. And this he is ready to verify; wherefore inasmuch as the faid *Robert Robins*, *Roger Mould*, *Robert Ellery* and *Edye Dawe*, have above acknowledged the taking of the faid cattle in the faid places in which, &c. the faid *Oliver* prays judgment and his damages, on occasion of the taking and unjustly detaining of the faid cattle to be adjudged to him, &c.

Replication.


And the faid *Robert Robins*, *Roger Mould*, *Robert Ellery* and *Edye Dawe*, protesting that they do not acknowledge any thing by the faid *Oliver* above pleaded in bar to be true, say, as before, that they the faid *Robert*, *Roger*, *Robert* and *Edye*, as bailiffs of the faid *Gabriel Barker* and *Lettice Thistlethwaite*, well acknowledge the taking of the faid cattle in the faid places in which &c. eating up the grafs there growing and doing damage there, as they the faid *Robert*, *Roger*, *Robert* and *Edye*, have by their faid cognisance above thereof alledged; *without this* that within the faid manor of *Blisland* there now is, and from all the time whereof the memory of man is not to the contrary was, such a custom that all the customary tenants of the customary tenements of the faid manor of *Blisland* have had, and have been used or accustomed to have the sole and several pasture in the faid places in which, &c. yearly and every year for the whole year at their will and pleasure, as belonging to their faid customary tenements, in manner and form as the faid *Oliver* by his bar to the cognisance of the faid *Robert*, *Roger*, *Robert* and *Edye* above thereof supposes. And this they are ready to verify; wherefore, as before, they pray judgment and a return of the faid cattle together with their damages, costs and charges in this behalf expended, according to the form of the statute aforefaid to be adjudged to them &c.

Traverses the
custom.

Rejoinder.
Takes issue
thereon.

And the faid *Oliver*, as before, says, that within the faid manor of *Blisland* there now is, and from all the time whereof the memory of man is not to the contrary was, such a custom that all the customary tenants of the customary tenements of
the

the said manor have had, and have been used and accustomed to have the sole and several pasture in the said places in which &c. yearly and every year for the whole year at their will and pleasure, as belonging to their said customary tenements in manner and form as he the said *Oliver* in his bar to the said cognisance above thereof supposes, and this he prays may be inquired of by the country; and the said *Robert, Roger, Robert* and *Edye* thereof likewise &c. Therefore the sheriff is commanded that he cause to come before our lord the king in 8 days of St. *Hilary* wheresoever &c., 12 &c., by whom &c., and who neither &c., to recognise &c., because as well &c., the same day is given to the said parties &c.: afterwards the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before our said lord the king at *Westminster* until 15 days from the day of *Easter* wheresoever &c. then next following, unless his majesty's justices assigned to take the assizes in the said county should first come on *Thursday* the 31st day of *March* at *Launceston* in the said county, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear: At which day before our said lord the king at *Westminster* comes the said *Oliver Hoskins* by his attorney aforesaid, and the said justices of our said lord the king of assize, before whom the said issue was tried, have sent hither their record had before them in these words, to wit: Afterwards on the day and at the place within contained before Sir *Richard Rainsford* knt., one of the justices of our said lord the king assigned to hold pleas before the king himself, and *Lawrence Swanton* being associated to the said Sir *Richard Rainsford*, and Sir *John Vaughan* knt., chief-justice of our said lord the king of the bench, justices of our said lord the king assigned to take the assizes in the county of *Cornwall* according to the form of the statute &c., come as well the within-named *Oliver Hoskins*, as the within named *Robert Robins* gent., *Roger Mould*, *Robert Ellery* and *Edye Darwe* by their attornies within mentioned. And the jurors of the jury, whereof mention is within made, being summoned, some of them, that is to say, H. T., S. B., H. W. jun., and J. M. come, and are sworn upon that jury; and because the

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Venire awarded.
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Process continued.

Nisi prius.

P. 522.

residue

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& al'.

Tales.

Verdict for the
plaintiff that
there is such a
custom.

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Judgment for
the plaintiff.

residue of the jurors of the same jury do not appear, therefore others of the bye-standers, being chosen by the sheriff of the county aforesaid, at the request of the said *Oliver Hoskins* and by the command of the said justices, are appointed a-new, whose names are annexed to the within-written panel, according to the form of the statute in such case made and provided; which said jurors so appointed a-new, that is to say, J. R., J. P., T. K., J. S., J. G., J. V., J. C., and H. S. being called likewise come, who together with the said jurors before impanelled and sworn, being chosen, tried and sworn to speak the truth of the matters within contained, say upon their oath, that within the said manor of *Blissland* there now is, and from all the time whereof the memory of man is not to the contrary was, such a custom that all the customary tenants of the customary tenements, of the said manor have had, and have used and been accustomed to have the sole and several pasture in the said places in which &c., yearly and every year for the whole year at their will and pleasure as belonging to their customary tenements of the said manor, in manner and form as the said *Oliver* has within in his bar alleged; and they assess the damages of the said *Oliver* on the occasion within mentioned, over and above his costs and charges by him about his suit in this behalf expended, to one penny, and for those costs and charges to 40s. Therefore it is considered that the said *Oliver Hoskins* do recover against the said *Robert Robins* gentleman, *Roger Mould*, *Robert Ellery*, and *Edye Darwe*, the said damages by the jurors aforesaid in form aforesaid assessed, and also 18l. for his said costs and charges, by the court of our said lord the king now here adjudged of increase to the said *Oliver Hoskins* and with his assent; which said damages in the whole amount to 20l. and 1d., and the said *Robert*, *Roger*, *Robert* and *Edye* in mercy &c.

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Case 54.

Hil. 22 & 23 Car. 2. Regis. Rot. 233.

REPLEVIN by *Hoskins* against *Robins* and others for taking the plaintiff's cattle in certain places, called *Em-lands-kercedown* and *Lady Moore*, in the parishes of *St. Breuer* otherwise *Symonward*, and *Blisland* in the county of *Cornwall*. The defendants make cognizance as bailiffs of *Doctor Barker* and *Lettice Thistlethwaite*, because they say that the several places in which &c. do contain 500 acres of lands and 500 acres of moor, and from time whereof, &c. were parcel of the manor of *Blisland* in the same county, of which the said *Barker* and *Thistlethwaite* were seised in their demesne as of fee, "and because the said cattle at the said time when &c. were in the said places in which &c. eating up the grass of the said *Gabriel Barker* and *Lettice Thistlethwaite*, there lately growing, and doing damage there," the defendants as bailiffs &c. well acknowledge the taking of the cattle damage-tenant &c. The plaintiff plead in bar to the said cognisance, and say that within the said manor of *Blisland* there are, and from time whereof &c. were divers customary tenements parcel of the said manor, and demised and demisable by copy of court roll of the said manor at the will of the lord according to the custom of the said manor; and that within the said manor there is, and from time whereof &c. there was a custom, that all the customary tenants of the customary tenements of the said manor "have had, and have used and been accustomed to have the sole and several pasture in the said places in which &c., yearly and every year for the whole year at their will and pleasure, as belonging to their said customary tenements." And the plaintiff further says that the said customary tenants before the time when &c., gave leave and licence to the said plaintiff to put in his cattle into the said places in which &c., by force whereof he put in his cattle there, and the defendants of their own wrong took them, wherefore he prayed his dam-

S. C. 2 Lev. 2.
1 Mod. 74.
1 Vent. 123.
163. 2 Keb.
753. 842.
The copyholders
of a manor may
have the sole and
several pasture in
the lord's soil,
and exclude him
S. P. Co. Litt.
122 a.

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ages, &c. The defendants reply to the plea in bar, that the plaintiff of his own wrong put in his cattle, wherefore they took them, and traverse the custom alleged by the plaintiff in his bar, upon which issue was joined, and it was found for the plaintiff, and his damages and costs assessed.

And now *Pollexfen* moved in arrest of judgment, and took several exceptions to the bar to the avowry. First, that it is not shewn what estate the copyholders mentioned in the plea had in their customary tenements to which they claimed the sole and several pasture. Secondly, the custom is not good to exclude the lord for the whole year, and cannot have a good commencement; for though the lord may grant it by deed to one or more freeholders, and therefore they may prescribe, if the grant was before time of memory, yet he cannot grant it to his own customary tenants on account of the debility of their estate, especially if they are only estates for life or years, as for any thing that appears to the contrary they are. And although it be true that by custom copyholders may have common in their lord's soil, because it is to be intended that it was with the permission of the lord at first for the better improvement of their copyhold estates, and the lord might very well spare such common, because he had enough besides for his own cattle, and by such constant usage it has at last arisen into a custom; yet there was not the same reason here, because no usage with the permission of the lord at first can wholly exclude the lord himself *nolens volens*, and vest all the interest in the copyholders who at first were bare tenants at will to the lord. Thirdly, that it is not alleged that the copyholders have the sole pasture for their cattle *levant ana couchant on their tenements*, for otherwise they cannot appropriate it to their tenements, and he cited *Noy's Rep.* 145. *Jeffreys* and *Boyd's* case, where one prescribed for common appurtenant to land, and did not say for cattle levant and couchant, and therefore it was held ill. Fourthly, that the copyholders here in the case at bar cannot give licence to a stranger to put in his cattle, for it is only for their benefit for their own cattle, but they cannot put in the cattle of any other, and for this he cited *Cro. Jac.* 574. *Monk v. Butler*; where one, who had common for twenty cattle certain, could

not

not licence another to put in the same number; *à fortiori* here they cannot licence, having the pasture for no certain number. Fifthly, that if the copyholders in this case could licence a stranger to put in his cattle, yet here the plaintiff has not shewn a sufficient licence, for such licence ought to be *by deed*, and for this he relied on the last-mentioned case, where it is so resolved; wherefore the plaintiff is not entitled to his action for want of title, he having alleged no good licence, if any licence at all could be granted, and therefore he prayed that judgment should be arrested.

Saunders for the plaintiff, as to the first exception, answered, that it is not material to shew what estate the copyholders have in their several customary tenements; because be their several estates either in fee, or for life, or years, yet the custom hath annexed this sole pasture as a profit *aprendre*, or perquisite to their *estates* for the time being; and they claim it by the custom of the manor, and not by prescription, for they cannot prescribe at all against their own lord, nor against any other, but only in the name (7) of their lord; but it is otherwise with respect to any tenants of *freehold estates* at the common law, for if they claim any such benefit, they must shew their estates, and prescribe (8) in the name of the tenant in fee by a *que estate*; but here the tenants by copy claim only by the custom, and for the reason before mentioned it is not necessary for them to shew their estates in certain. And as to the second exception, he said, that the custom was good, and might have had a reasonable beginning; and that it was good he cited the case of *Pitt v. Chick*, *Hutt.* 45.; where it is adjudged that one may *prescribe* for the sole feeding, because it might have commenced *by grant*, and then if it may be pleaded by *prescription* in this case, it may be good by *custom*; and such custom might commence at first by the voluntary agreement of the lord with his copyhold tenants that they should have the sole pasture, to induce them to hold their customary estates, which then were only bare estates at will, and to bestow their pains and labour in improvement, as well for the benefit of the lord himself, as for their own proper advantage; and so a continual usage has now made a custom, for the same reason that it has now fixed the estates of

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& al^o.

Where copyholders claim common, or the several pasture in the lord's soil by custom, it is not necessary to shew what estate they have in their copyholds, because the custom annexes it as a profit to their estates for the time being.

(7) See 1 Saund. 348, note (11).

(8) See 1 Saund. 346. *Mel. v. S. ateman*, and also note (2).

Copyholders may by custom have the sole pasture in exclusion of the lord.

See 1 Saund.

353. *Potter v. North*, note (2).

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Where one
claims common
appurtenant it
must be for his
cattle *levant and
couchant* because
it is the standard
of the profit he
is to have.
2 Roll. Abr.
706. pl. 41.
Com. Dig.
Common (K).
(9) See 1 Saund.
346 d. con-
tinuation of
note (2).
(4) See the ar-
gument of North
to this effect in
1 Saund. 352.
Potter v. North.
But where copy-
holders claim the
sole pasture in
exclusion of the
lord, it is not
proper to limit it
to their cattle *le-
vant and couch-
ant*.
One who claims
common in gross,
or for his cattle
levant and
couchant, can-

copyholders and made them permanent, and enabled the copyhold tenants to maintain an action against the lord, if he puts them out of their copyhold tenements against the custom, though their estates originally were merely at the will of the lord. As to the third exception, he answered, that true it is that a man, who claims only *common appurtenant* to his land, ought to say for his cattle *levant and couchant*, or otherwise his prescription is not good: because in that case he claims but part of the herbage, and the rest the lord is to have, therefore the commoner ought to say for his cattle *levant and couchant*, for that is the standard or meteward of the profit he is to have; that is to say, grafs for all his cattle *levant and couchant* on his land, and no others, and therefore if he puts in any cattle which are not levant and couchant he does a wrong to the lord and shall be punished as a trespasser for them. But it is otherwise here, for the copyholders here claim *all the herbage* and wholly exclude the lord, therefore it is not material whether all the grafs is depastured by cattle levant and couchant, or any others, for there is no more mischief or wrong to the lord in one case than in the other (9). And he said further that it will be absurd (4) to claim all the herbage and yet limit it to be taken by the mouths of cattle levant and couchant only, for perhaps in some fertile years the cattle which are levant and couchant will not be sufficient to depasture all the grafs, and then the rest will be wasted and spoiled, for the lord is to have no part of it; and therefore he concluded that it is not necessary to say for cattle *levant and couchant*, but it was better as it was now. And as to the fourth exception, he said that a commoner, who claims common in gross without (10) number, or for cattle levant (11) and couchant, cannot license a stranger to put in his

(10) But 1 Roll. Abr. 402. (Q) pl. 5. seems contrary.

(11) And so is Cro. Jac. 14. *Drury v Kent*. 2 Leon. 202. 1 Roll. Abr. 398. (H.) pl. 1. Ibid. (Q.) pl. 1, 2. 1 Burr.

316. *Robinson v. Raley*, where it is held that a person can only claim a right of common for his own commonable cattle levant and couchant, and therefore the whole may be traversed, and of course must

his cattle, because it will be a wrong to the lord or owner of the soil for one to surcharge the common ; but where one claims all the herbage, as here, or pasture for a certain number of cattle, he may license a stranger to put in his cattle, for it is no wrong to the lord or owner of the soil, because it cannot be a surcharging ; and the same reason holds place here as in the answer to the first exception respecting levant and couchant. And as to the last exception it was answered, that it appears by the fore-mentioned case of *Monk v. Butler*, Cro. Jac. 574. that he who has an interest in the soil may license another to use a liberty (e) in the soil, without deed, although one who only claims common cannot do so ; and here the copyholders have an interest in the herbage, and therefore they may license any to depasture the grafs there, for no person can punish the trespass for depasturing the grafs but themselves, and therefore they may dispense with such trespass by their license without deed ; but it is otherwise of commoners, for there the lord or owner of the soil may bring an action of trespass for depasturing the grafs, and therefore the license of the commoners will not excuse the trespass, unless they grant their interest by deed, where it is grantable over. And he further said that here the defendants have made an avowry for damage-feasant in eating up the grafs, where it appears that all the grafs belongs to the copyholders and not to the lord, and he had no cause to distrain the plaintiff's cattle, and therefore the plaintiff ought to recover his damages for the wrongful distraining of his

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not license a stranger to put in his cattle on the common, but if he claims common only for a certain number of cattle, or the sole pasture, he may.

(e) To hunt, or the like.

must be proved by a commoner in order to give him a compleat title to common for cattle levant and couchant. See 1 Saund. 346. c. continuation of note (2.) If A. and all those whose estate he has in the manor of D., have had from time immemorial a fold course, that is, common of pasture for any number of sheep not exceeding 300 in a certain field, as appurtenant to the manor, he may grant over to another this fold course, and so make it in gross ; because the common

is for a certain number, and by the prescription the sheep are not to be levant and couchant on the manor, but it is a common for so many sheep appurtenant to the manor, which may be severed from the manor, as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. 1 Roll. Abr. 402. pl. 3. *Day v. Spooner*. S. C. Cro. Car. 432. Sir W. Jones, 375.

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A licence by copyholders who have the sole pasture, to a stranger to put in his cattle must be by deed; but the want of stating it to be by deed is aided after verdict by the statute of jeofails (12).

his cattle; wherefore he prayed judgment for the plaintiff.— And this case depended until now, and then it was moved again.

And the court over-ruled all the exceptions but the last, for the reasons of *Saunders*; but as to the last *Hale* chief justice, and the court seemed to be of opinion that such licence could not be granted without deed; but after verdict on an issue joined on the custom it was aided, for now it shall be presumed that there was a good licence granted by deed, when the defendants have taken issue on another point; for they thereby admit that the plaintiff had a good and effectual licence, provided there was such a custom within the manor as the plaintiff alleges. And it being now found that there is such a custom, the court will presume the licence to be such a good licence as the law requires. And as to that which was urged by *Saunders* that the distress damage-feasant appears to be tortious because the lord has not any interest in the herbage, *Hale* answered, that the avowry was good notwithstanding that, for the lord may distrain for other damage in his soil the cattle of any who have no right to put in their cattle, although he has not any interest in the herbage; and the avowry is that the cattle were in the place in which &c., eating up the grass there growing, and doing damage there; so that there is another damage to the soil (13) besides depasturing the grass: wherefore the defendants might well avow. However, here the insufficiency of pleading the licence is aided by the statute of jeofails after verdict.—And therefore judgment was given for the plaintiff.—See *Cro. Eliz.* 458. *Corbyson v. Pearson*.

(12) For common, or the sole and several pasture, is a thing which lies in grant: and therefore a licence to a stranger to use it, which in effect amounts to a grant of the common or pasture itself, can only be by deed. See *ante*, 297, 298. notes (1, 2).

(13) For the lord's interest in the mines, trees, bushes, &c. still continues, to which damage may be done as well as to the grass. 1 Vent. 123. 163.

Dennis *versus* Dennis.

Case 55.

Hil. 22 & 23 Car. 2. Regis. Rot. 239.

COUNTRY of Southampton, to wit. Our lord the king has sent to his right trusty and well-beloved Sir *John Vaughan* knt. his chief justice of the bench his writ close in these words, to wit; *Charles* the second, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith &c., to our right trusty and well-beloved Sir *John Vaughan* knt., our chief-justice of the bench, greeting; Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court before you and your companions our justices of the said bench, by our writ, between *Frances Dennis* widow, who was the wife of *Edward Dennis* esq., and *Bridget Dennis*, for that the said *Bridget* should render to the said *Frances* her reasonable dower which falleth to her out of the freehold which was of the said *Edward* heretofore her husband, in *Brereding*, *Shancklyn* otherwise *Schancklynge*, *Bouchurch*, *Godshill*, and *Shorewell* in the *Isle of Wight*, and *Chatford* in the county of *Southampton*, as it is said, manifest error hath intervened to the great damage of the said *Bridget*, as by her complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you send to us distinctly and openly under your seal, the record and proceedings aforesaid, with all things concerning the same, and this writ, so that we may have them in 15 days from the day of *St. Martin* wheresoever we shall then be in *England*: that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to the law and custom of our realm of *England*, ought to be done. Witness ourself at *Westminster*, the 22d day of *October* in the 21st year of our reign.

Error from the
Common Pleas
to the King's
Bench in dower.

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J. Norbury.

The

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Chief justice's
return.

The answer of Sir *John Vaughan* knt. the chief-justice within named.

The record and proceedings of the said plaint, whereof mention is made in the said writ, follow in these words, to wit:

Pleas at *Westminster* before Sir *John Vaughan* knt. and his companions justices of our lord the king of the bench, of the term of the holy *Trinity* in the 21st year of the reign of our lord *Charles* the second, by the grace of God, of *England, Scotland, France and Ireland*, king, defender of the faith, and so forth. Roll. 1229.

Declaration in
dower.

County of Southampton. to wit. *Frances Dennis* widow, who was the wife of *Edward Dennis* esq. by Sir *Thomas Badd* knt. and bart. who is admitted by the court of the king here to prosecute for the said *Frances* being within age, as the next friend of the said *Frances*, demands against *Bridget Dennis* the third part of the manors of *Shancklyn, Rowe and West-court* with the appurtenances, and of 32 messuages, 13 cottages, one water-mill, 45 gardens, 45 orchards, 1309 acres of land, 180 acres of meadow, 388 acres of pasture, 68 acres of wood, 600 acres of furze and heath, 42 acres of moor, 17l. 7s. 10d. rent, and the rent of four bushels of samphire, with the appurtenances, in *Brereding, Shancklyn*, otherwise *Shancklynge, Bouchurch, Godshill and Shorewell* in the *Isle of Wight*, and *Chatford*, and also of the advowson of the church of *Bouchurch*, & the dower of her the said *Frances* of the endowment of the said *Edward* heretofore her husband &c. And it is to be known that the said *Frances* in the court of the king here made her demand in the said writ of the third part of the manors of *Shancklyn, Rowe, and West-court* with the appurtenances, and of 32 messuages, 13 cottages, one water-mill, 45 gardens, 45 orchards, 1309 acres of land, 180 acres of meadow, 388 acres of pasture, 68 acres of wood, 600 acres of furze and heath, 42 acres of moor, 17l. 7s. 10d. rent, and the rent of four bushels of samphire, and common of pasture for 1281 sheep, and common of pasture for all other cattle with the appurtenances, and also of the advowson of the churches of *Bouchurch and Shancklyn*, and now abridges (1) that demand to the said third part of the manors of *Shancklyn, Rowe,*

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Demandant
abridges her
demand.

(1) See Lev.
Ent. 26. ante,
4a.b. William v.
Gwyn, note.

Rowe, and *West-court* with the appurtenances, and of 32 messuages, 13 cottages, one water mill, 45 gardens, 45 orchards, 1309 acres of land, 180 acres of meadow, 388 acres of pasture, 68 acres of wood, 600 acres of furze and heath, 42 acres of moor, 17l. 7s. 10d. rent, and rent of four bushels of samphire, with the appurtenances, and also of the advowson of the church of *Bouchurch* &c.

And the aforesaid *Bridget* by *Henry Kempe* her attorney, comes and says, that the said *Frances* ought not to have her dower of the manors, tenements and rents aforesaid with the appurtenances, and advowson aforesaid, of the endowment of the said *Edward* heretofore her husband, because she says that the said *Edward* heretofore her husband was not, either on the day on which he married the said *Frances*, or ever after seised of such estate of and in the said manors, tenements and rents with the appurtenances, and advowson aforesaid whereof &c. that he could endow the said *Frances* thereof, and of this she puts herself upon the country, and the said *Bridget* likewise. Therefore the sheriff is commanded that he cause to come here in three weeks of the holy *Trinity*, twelve &c., by whom &c., and who neither &c., to recognize &c., because as well &c. At which day the jury between the parties aforesaid in the plea aforesaid was respited between them here until this day, to wit, in three weeks (b) of *St. Michael* then next following, unless his majesty's justices, assigned to take the assizes in the county aforesaid, should first come on *Wednesday* the 14th day of *July* last past at the castle of *Winton* in the said county, according to the form of the statute &c. for default of jurors, because none of them did appear. And now here at this day comes the said *Frances* by her next friend within named, and the said justices of assize before whom &c. have sent hither their record in these words: Afterwards on the day and at the place within contained, before Sir *John Vaughan* knt. chief-justice of our lord the king of the bench, and Sir *John Archer* knt. one of the justices of our said lord the king of the bench, justices of our said lord the king assigned to take the assizes in the county of *Southampton*, according to the form of the statute &c., come as well the within-named *Frances Dennis* widow, as the within-named *Bridget Dennis*

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Plea.
*N'ungues seizie
que dower.*
See ante, 44. c.
William v.
Gwyn, note.

Issue.

Venire.

Jurata.

(b) The day of
the return of the
habeas corpora
juratorum.

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Nisi prius.

Postea.

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Verdict for the
demandant, that
her husband was
seised of an
estate whereof
she is dowable ;

(2) See ante,
45. 45. a. note.

and died so seised
on the 2d of
April 1667.

The premises are
of the yearly
value of 57ol.

and assesses dam-
ages and costs.

Judgment, to re-
cover seisin of a
third part of the
premises,

Dennis by her attorney within mentioned ; and the jurors of the jury, whereof mention is within made, being summoned, some of them, that is to say, T. B., J. G. jun., T. G., E. O., R. H., J. F., W. W., and W. T. come and are sworn upon that jury ; and because the residue of the jurors of the same jury do not appear, therefore others of the by-standers, being chosen by the sheriff of the county aforesaid, at the request of the said *Francis Dennis* and by the command of the said justices, are appointed anew, whose names are annexed to the within-written panel, according to the form of the statute in such case lately made and provided ; which said jurors so appointed anew, that is to say, H. A., R. K., J. M., and G. W. being called, likewise come, who, together with the said other jurors before impanelled and sworn, being chosen, tried and sworn to speak the truth of the matters within contained, say upon their oath, that the within-named *Edward Dennis* heretofore the husband of the said *Frances Dennis* was, on the day in which he married the said *Frances*, and after, seised of such estate of and in the within-mentioned manors, tenements and rents with the appurtenances and advowson within mentioned, that he could endow the said *Frances* thereof, as the said *Frances* has within alleged. And the jurors aforesaid upon their oath aforesaid further say (2) that the said *Edward Dennis* being so as aforesaid seised of such estate of and in the within-mentioned manors, tenements and rents with the appurtenances, and advowson aforesaid, died so seised thereof on the 2d day of *April* in the 19th year of the reign of our lord *Charles* the 2d, now king of *England*, &c., and that the said manors, tenements and rents aforesaid with the appurtenances, and advowson aforesaid, are worth by the year in all issues besides reprises 57ol., and they assess the damages of the said *Frances* on occasion of the detention of her said dower over and above the said value, and over and above her costs and charges by her about her suit in this behalf expended, to 12l., and for those costs and charges to 4os. Therefore it is considered that the said *Frances* do recover against the said *Bridget* as well her seisin of a third part of the said manors, tenement and rents with the appurtenances, and of the advowson aforesaid, to hold to her in severalty by metes and bounds,

bounds, as the value of a third part of the said manors, tenements and rents with the appurtenances, and advowson aforesaid, from the time of the death of the said *Edward* heretofore her husband, which said value, from the time of the death of the said *Edward* heretofore her husband, amounts to 475*l.* and her damages aforesaid to 14*l.* by the jurors aforesaid in form aforesaid assessed, and also 4*l.* for her said costs and charges, by the court here adjudged of increase to the said *Frances* and with her assent; which said value and damages in the whole amount to 530*l.* and the said *Bridget* in mercy, (3) &c. whereof 48*l.* 10*s.* are assigned to *Thomas Robinson* esq. clerk of our lord the king.

Afterwards, to wit, on *Monday* next after three weeks of *St. Michael* in this same term, before our lord the king at *Westminster* comes the said *Bridget Dennis*, who is an idiot, by Sir *Alexander Fraser* knt. the friend of the said *Bridget*, by the court here specially admitted for the said *Bridget*, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that she the said *Bridget* is, and on the day of suing out the original writ of the said *Frances*, and also from the time of her nativity continually hitherto, was, a fool and an idiot never enjoying lucid intervals, so that she neither is nor was sufficient to manage her said manors, messuages, lands, tenements, goods and chattels, and it appears in the said record that she the said *Bridget* appeared in the said plea by the said *Henry Kempe* then her attorney, and pleaded in bar of the said dower demanded by the said *Frances* in the said plea, in the form above specified in the said record; whereas by the law of the land of this realm of *England* the said *Bridget* ought to have appeared and pleaded in the said plea by her friend, and not by the said *Henry Kempe* her attorney; and therefore inasmuch as the said *Bridget* appeared in the said plea and pleaded in bar of the said dower in form aforesaid by her said attorney, and not by her friend, as by the law of the land she ought to have appeared and pleaded, the said *Bridget* says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest error; and she prays that the judgment aforesaid for the error aforesaid, may be

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and the mesne profits, damages and costs.

(3) See ante, 45. n. 4. and the case of *Curtis v. Curtis*, 2 Brown. C. C. 620.

Alligment of
idiotcy in the
defendant.

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Impar lance.

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Replication, that she was of sound mind until such a day, when she became *non compos mentis*;

and traverses that she was an idiot from the time of her birth.

be revoked, annulled, and altogether held for nothing, and that she the said *Bridget* may be restored to all things which she has lost by occasion of the judgment aforesaid. Whereupon on the same *Monday* next after three weeks of *St. Michael* in this same term, before our said lord the king at *Westminster* comes the said *Frances* by *John Saunders* her attorney, and thereupon the said *Frances*, having heard the said error in form aforesaid assigned, prays a day to imparl to the said error, and it is granted to her, &c. and thereupon a day is thereof given to the said parties before our lord the king until the octave of *St. Hilary* wheresoever &c. that is to say, to the said *Frances* to imparl to the said error and then to rejoin to the said error. At which day before our said lord the king at *Westminster* come as well the said *Frances* by the said *John Saunders* her said then attorney, as the said *Bridget* by the said *Sir Alexander Fraser* her friend, and the said *Frances* says that, by reason of any thing by the said *Bridget* above for error assigned, the judgment aforesaid ought not to be reversed or annulled, because she says that the said *Bridget*, at *Bouchurch* aforesaid in the said record above mentioned, from the time of her nativity was and continued of sound and whole mind and understanding until the 23d day of *May*, in the 22d year of the reign of our lord the now king, on which day the said *Bridget* at *Bouchurch* aforesaid, purely by the visitation of God, became of unsound mind, and has always continued so from thence hitherto; *without this* that the said *Bridget* from the time of her nativity was a fool and an idiot (4) as the said *Bridget* has above alleged. And this she is ready to verify; wherefore she prays judgment and that the judgment aforesaid may be affirmed, and stand and remain in its full force, vigour and effect.

And

(4) It is held that if an *idiot* sue, he must *appear in person*, and any one who prays to be admitted as his friend may sue for him; so if an action be against him, he *must appear in his proper person*, and any one who can make a better de-

fence, shall be admitted to defend for him; but a *lunatic*, or one *who becomes non compos mentis*, must appear by *guardian*, if he is within age, and by *attorney*, if he be of full age. 4 Rep. 124. b. *Beverley's case*.

And the said *Bridget* by the said Sir *Alexander Fraser* knt. her said friend, as before, says that the said *Bridget* from the time of her nativity hitherto was a fool and an ideot as the said *Bridget* has in the assignment of the said errors alleged, and this she prays may be inquired of by the country, and the said *Frances* likewise. Therefore the sheriff of the county of *Southampton* is commanded that he cause to come before our lord the king on the octave of the purification of the blessed *Mary* wheresoever &c. twelve &c. by whom &c. and who neither &c. to recognise &c. because as well &c. the same day is given to the said parties there &c. At which day before our lord the king at *Westminster*, come as well the said *Bridget* by the said Sir *Alexander Fraser* her friend, as the said *Frances* by her said attorney, and the sheriff returns the said writ of *venire facias* in all things served and executed, together with a panel of the names of the jurors in all things executed, none of whom appeared &c. therefore the said sheriff of the said county of *Southampton* is commanded that he distrain the said jurors by all their lands and chattels in his bailiwick, so that neither they, nor any one by them, do lay hands on the same, until he should have another command from our said lord the king in that behalf; and that he answer to our said lord the king for the issues of the same, so that he may have their bodies before our said lord the king in 15 days of *Easter* wheresoever &c., unless his majesty's justices, assigned to take the assizes in the said county, shall first come on *Wednesday* the 15th day of *March* at the castle of *Winton* in the said county, according to the form of the statute, for the default of the said jury because none of them did appear. At which day, before our said lord the king at *Westminster* come as well the said *Bridget* by the said *Alexander Fraser* her friend, as the said *Frances* by her said attorney; and the said justices of our lord the king of assize before whom the said issue was tried, have sent hither their record had before them in these words, to wit: Afterwards, on the day and at the place within contained, before Sir *Richard Rainsford* knt. one of the justices of our lord the king assigned to hold pleas before the king himself, and *Lawrence Swanton* esq. associated for this time to the said *Richard Rainsford*, and

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Rejoinder, takes
issue on it.

Sheriffs returns
the *venire*.

Distingas juratores.

Nisi prius.

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Posse.

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Talet.

Plaintiff non-
suted.

and Sir *John Vaughan* knt., chief justice of our said lord the king of the bench, justices of our said lord the king assigned to take the assizes in the county of *Southampton* according to the form of the statute &c. the presence of the said Sir *John Vaughan* not being expected by virtue of his said majesty's writ of *fi non omnes* &c. come as well the within-named *Bridget Dennis* by her friend within-named, as the within-named *Frances Dennis* by her attorney within-mentioned; and the jurors of the jury, whereof mention is within made, being summoned, some of them, that is to say, D. H., H. W., J. K., J. W., T. S., J. H., R. M., J. M., W. H. junior, W. G., and W. T., come and are sworn upon that jury; and because the residue of the jurors of the same jury do not appear, therefore another of the by standers, being chosen by the sheriff of the county aforesaid, at the request of the said *Bridget Dennis* and by the command of the said justices, is appointed anew, whose name is annexed to the within-written panel, according to the form of the statute in such case lately made and provide^d; which said juror so appointed anew, to wit, J. W. being called, likewise comes, who, together with the said other jurors impanelled and sworn, being chosen, tried and sworn to speak the truth of the matters within contained, retired from the bar here to confer together about giving their verdict thereon, and having so conferred together and agreed among themselves, returned here to the bar to give their verdict; whereupon the said *Bridget Dennis* although solemnly called, comes not, nor does she further prosecute her writ within specified against the said *Frances Dennis*; whereupon as well the record and proceedings and the judgment given thereupon, as the cause and matter aforesaid above for error assigned and alleged, being seen and by the court of our said lord the king here more fully understood and diligently examined, it appears to the court of our said lord the king here that the said record is in no wise vitious or defective, and that there is no error in the said record; therefore it is considered that the judgment be in all things affirmed, and stand in full force and effect; the several matters and causes above for error assigned and alleged in any wise notwithstanding: and it is further considered that the said *Frances*

do

do recover against the said *Bridget* 300l. adjudged to the said *Frances* by the court of our lord the king now here, according to the form of the statute in such case made and provided, for her damages, costs and charges which she has sustained by reason of the delay of execution of the judgment aforesaid, on pretence of the prosecution of the said writ of error, and that the said *Frances* have execution thereof, &c.

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See ante, 101.
p. 101. f.

Dennis *versus* Dennis.

Case 55.

Hil. 22 & 23 Car. II. Regis. Rot. 239.

ERROR brought by *Bridget Dennis* against *Francis Dennis* widow, the late wife of *Edward Dennis*, to reverse a judgment in dower in the common bench of lands in *Bouchurch* and other places in the county of *Southampton*, where the defendant appeared by attorney and pleaded *n'ungues seizie que dower*, and a verdict and judgment thereupon for the demandant in the common bench. And the plaintiff in the writ of error in *Michaelmas* term last past assigned an error in fact in this manner, that is to say: "afterwards, to wit, on *Monday* next after three weeks of *St. Michael* in this same term, before our lord the king at *Westminster*, comes the said *Bridget Dennis*, who is an idiot, by *Sir Alexander Fraser* knt., the friend of the said *Bridget* by the court here specially admitted, and she the said *Bridget* says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that she the said *Bridget* is, and on the day of suing out the original of the said *Frances*, and also from the time of her nativity continually hitherto, was, a fool and an idiot never enjoying lucid intervals, so that she neither is nor was sufficient to manage her manors, messuages, lands, tenements, goods and chattels; and it appears in the said record that she the said *Bridget* appeared in the said plea by the said *Henry Kempe* then *her attorney*, and pleaded in bar of the said dower demanded by the said *Frances* in the said plea, in form above specified in the said record;

S. C. 2 Lev. 5.
2 Keb. 767.
The defendant in error took down the record of *Nisi prius*, and proceeded to trial at the first assizes after issue joined, and held good.

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record; whereas by the law of the land of this realm of *England* the said *Bridget* ought to have appeared and pleaded in the plea aforesaid by her *friend*, and not by the said *Henry Kempe* her *attorney*; and therefore inasmuch as the said *Bridget* appeared in the said plea, and pleaded in bar of the said dower in form aforesaid by her said *attorney* and not by her *friend*, as by the law of the land she ought to have appeared and pleaded, the said *Bridget* says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error; and she prays that the judgment aforesaid for the error aforesaid, may be revoked, annulled and altogether held for nothing, and that she the said *Bridget* may be restored to all things which she hath lost by occasion of the judgment aforesaid." Upon which the defendant in error prayed a continuance until *Hilary* term now past, and then the defendant rejoined to the error in this manner, to wit, "At which day before our said lord the king at *Westminster* come as well the said *Frances* by *John Saunders* her *attorney*, as the said *Bridget* by the said *Sir Alexander Fraser* her *friend*, and the said *Frances* saith that by reason of any thing by the said *Bridget* above for error assigned, the judgment aforesaid ought not to be reversed or annulled, because she says that the said *Bridget* at *Bouchurch* aforesaid in the said record above mentioned, from the time of her nativity was and continued of sound and whole mind and understanding until the 23d day of *May* in the 22d year of the reign of our said lord the now king, on which day she the said *Bridget* at *Bouchurch* aforesaid, purely by the visitation of God, became of unsound mind, and has always continued so from thence hitherto; without this that the said *Bridget* from the time of her nativity was a fool and an idiot as the said *Bridget* has above alleged; and this she is ready to verify; wherefore she prays judgment, and that the judgment aforesaid may be affirmed and stand and remain in its full force and vigour and effect." And on this traverse the plaintiff in error took issue; whereupon the defendant in error this last vacation, being the first assizes after the issue was joined, took a record of *nisi prius* and proceeded to trial before the justices of assize

in the county of *Southampton*, where the plaintiff in error was non-suited. DENNIS v. DENNIS.

And now in the beginning of this term, it was moved that the *poslea* should not be recorded, but that there should be a new trial, because the said Sir *Alexander Fraiser* being king's physician, and several of the royal family being unwell, he could not attend the trial. And for the matter in law it was urged, that the defendant had proceeded to trial before his time, for it being the first assizes after issue joined, the plaintiff had liberty to proceed to trial or not at his election; and before he had made default, the defendant could not have a trial by proviso (4); but notwithstanding all these objections, the

(4) But this was not a trial by proviso, as appears by the entry of the *venire* and *disfringas* in page 333; for whenever the defendant carries down the cause by proviso, the following clause is inserted in the *venire* and *disfringas*: "provided always that if two writs thereof should come to you, one of them only return and execute;" from which clause the trial by *proviso* takes its name: nor, as it seems, was a trial by proviso necessary in this case; because it is holden, that on an issue of fact in a writ of error, the defendant may carry down the cause to trial without a rule for trying it by proviso, which is absolutely necessary to be obtained, as we shall see presently, when the defendant takes down the record to trial by proviso. And by the report of the principal case in 2 Lev. 5. it appears, that the defendant did in fact carry down the record to the first assizes after issue joined *without* a proviso, which the court afterwards held he might do, for he was an actor in the first suit and was delayed, and a precedent

was cited where the same thing had been done before. So in *replevin*, *prohibition*, and *quare impedit*, the defendant is considered as an actor, for he is entitled in the former case to a return; in the second to a consultation; (see 1 Saund. 140. *Croucher v. Collins*, note (5),) and in the last to a writ to the bishop; and therefore it seems, the defendant may carry down the record to trial in these suits at the assizes next after issue joined *without* a proviso, as well as in a writ of error. 2 Salk. 652. *Queen v. Banks*: though even in these cases the general practice seems to be for the defendant to insert the clause of proviso in the *venire*, *disfringas*, or *habeas corpora*. 3 Term. Rep. 651. *Jones v. Concannen*. 1 Black Rep. 375. *Eggleton v. Smart*.

It is however true, that where the defendant proceeds to trial by proviso, he cannot do so, until the plaintiff has been guilty of a laches or default in not proceeding to trial when by the course and practice of the court he ought to have done. And before the defendant can have such trial by proviso, it is necessary

DENNIS v. the *postea* was recorded, and the judgment afterwards affirmed,
 DENNIS. as you see entered in the pleadings in this case.

cessary that the issue should be entered on record: and therefore, if it be not already done, the defendant must for that purpose obtain a rule for the plaintiff to enter the issue; and unless he does so within a limited time after, the defendant may sign a judgment of non-pross; but if the plaintiff does accordingly enter the issue, and is afterwards guilty of delay in not proceeding to trial, the defendant must then procure a rule for a trial by proviso, which rule is essentially necessary to enable him to take down the record, though it may be obtained by him, after he has given notice of trial. 2 Str. 1055. *Dodson v. Taylor*. 1 Term Rep. 695. *King v. Pippett*. Tidd's Prac. 689. But if the *venue* be laid in London or Middlesex, the defendant cannot give a rule for the plaintiff to enter the issue the same term it is joined, unless notice of trial has been given; and in a country-cause the plaintiff is no ways bound to enter the issue the same term; Tidd's Prac. 662, 663; and when the issue is entered, the plaintiff is held to be guilty of such a laches or default as entitles the defendant to carry down the cause by proviso, if he do not proceed to trial, in a town cause, in the sitting next after the term in which the issue is so entered; and in a country-cause, at the next assizes after the issue is so entered. And when the defendant intends to proceed by proviso, he must give the same notice of trial to the plaintiff, as the plaintiff would have been obliged to have given him: and if

the defendant after such notice does not proceed to trial, or does not countermand it in due time, he is liable to pay the plaintiff his costs; Tidd's Prac. 688. 1 Term Rep. 696. *King v. Pippett*; and where both the plaintiff and defendant give notice of trial, and do not go to trial, both are intitled to costs; Sellon Prac. 418; but if they both carry down records, the trial shall be by the plaintiff's record, if he enters it with the judge's marshal, otherwise the defendant may proceed on his record. Tidd's Prac. 686. By statute 7 and 8 W. 3. c. 32. s. 1. it is enacted, that if any defendant, or tenant, in any action depending in any of the courts at Westminster shall be minded to bring to trial any issue joined against him, when by the course in any of the said courts he may lawfully do the same by proviso, such defendant or tenant may, of the issuable term next preceding such intended trial to be had at the next assizes, sue out a new *venire facias* to the sheriff by proviso, and prosecute the same by writ of *habeas corpora*, or *distingas* with a *nisi prius*, as though there had not been any former *venire facias* sued out or returned in that cause, and so *toties quoties* as the matter shall require. Where the record is carried down by the defendant, and the issue happens to be upon the plaintiff, who is therefore to begin first, but he does not appear, the defendant must not enter upon his proof and take a verdict, but the proper course is held to be to call the plaintiff

and nonsuit him; it was so done in the principal case as appears by the pleadings, and was so adjudged in *Gardener v. Davis*. 1 Will. 300. and in *Hicks v. Young*. Barnes 458.

The trial by proviso was formerly the only way which the defendant had to get rid of the action, where the plaintiff neglected to proceed to trial; but the expence and delay attending such trial was obviously a great inconvenience and vexation, therefore to remedy such mischief in most cases in future, it was enacted by statute 14 Geo. 2. c. 17. "That where any issue is or shall be joined, in any action or suit at law, in any of his majesty's courts of record at *Westminster*, courts of great sessions in *Wales*, *Chester*, and the courts of *Durham* and *Lancaster*, and the plaintiff or plaintiffs in any such action or suit hath or have neglected, or shall neglect, to bring such issue on to be tried, according to the course and practice of the said courts respectively, it shall and may be lawful for the judge, or judges of the said courts respectively, at any time after such neglect, upon motion made in open court (due notice having been given thereof), to give the like judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit; unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time for the trial of such issue; and if the plaintiff or plaintiffs shall neglect to try such issue, within the time so allowed, then and in every such case, the said judge or judges shall proceed to give such judgment as aforesaid. Provided always, that all judgments

"given by virtue of this act, shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect: Provided also, that the defendant or defendants shall upon such judgment be awarded his, her or their costs in any action or suit, where he, she or they would upon nonsuit be entitled to the same, and in no other action or suit whatsoever."

This statute has been held not to extend to replevin, because the defendant may carry down the cause to trial himself. 1 Black. Rep. 375. *Eggleton v. Smith*. 3 Term Rep. 661. *Jones v. Concannon* 5 Term Rep. 400. *Shortridge v. Hiern*. There seems to be an inaccuracy in the reason assigned for this, namely, because the defendant may carry the record down to trial by proviso, for that equally applies to all other cases; but the true reason seems to be, because the defendant may carry down the record to trial without a proviso, as well as the plaintiff. It is settled, that the defendant in replevin may take down the record immediately after issue joined, and not wait until the plaintiff has been guilty of a default, which every defendant must do, if he proceed by proviso; and therefore as the defendant may carry down the record immediately to trial as well as the plaintiff, it follows that the statute of 14 Geo. 2. does not apply to the action of replevin. So if the statute has been once complied with, as where the plaintiff has carried the cause down to trial and obtained a verdict, which was afterwards set aside, or was nonsuited, and the nonsuit set aside, or the cause was made a *remanet*; and the plaintiff neglects to go to trial again,

again, the defendant cannot in these cases have judgment as in case of a nonsuit, but he must still carry down the record by proviso, as before the statute. 1 Term Rep. 492. *King v. Eppett*. 3 Term Rep. 1. *Meawburn v. Long*. 1 H. Black. 103. *Porzelius v. Maddocks*.

The course and practice of the court, referred to by the statute of 14 Geo. 2. is that which before regulated the trial by proviso; and as the defendant could not have had such trial, until the plaintiff had been guilty of laches, nor until after the issue was entered on record, so neither till then, is he entitled to judgment as in case of a nonsuit. Tidd's Prac. 690. It has been already noticed, that if the *venue* be laid in *London* or *Middlesex*, the defendant cannot give a rule for the plaintiff to enter his issue *the same term* in which it is joined, unless notice of trial has been given; and accordingly it is held that in a town-cause, unless notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit the next term after that in which issue was joined, although it was joined early

enough to enable the plaintiff to give notice of trial for the sittings after that term; 4 Term Rep. 557. *Munt v. Tremamondo*. 1 H. Black. 123. *Baker v. Newman*. Ibid. 282. *Woulfe v. Sholls*; the plaintiff in such case, having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after. Tidd's Prac. 691. But if *notice of trial* has been given in a town cause for a sitting in term, the defendant may move for judgment as in case of a nonsuit the next term, being the term after that in which the issue ought to have been entered. Ibid. In a *country-cause* where notice of trial is given for the assizes, the defendant may move for judgment as in case of a nonsuit the next term; but the plaintiff is not bound to give notice of trial, till the term succeeding that in which issue is joined. 2 Term Rep. 734. *Hall v. Buchanan*; and if he do not, the defendant cannot move for judgment as in case of a nonsuit, till after the next assizes. Tidd's Prac. 692.

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Case 56.

Cooke *versus* Whorwood.

Hil. 22 & 23 Car. II. Regis. Rot. 116.

S. C. 1 Lev. 6.
2 Keb. 767.
See ante, 293.
Pope v. Brett.
An award that one of the parties shall be bound in a bond
• another is good, but not that he shall find a surety to enter into a bond.

ASSUMPSIT to perform an award. The plaintiff declares that there was a dispute between the defendant and him concerning the arrears of rent, and that they submitted to arbitration and mutually promised to perform it; and then he shews the award, by which the defendant was awarded to

pay the plaintiff several sums of money at several times, and that the defendant shall give a bond in the penalty of 1800l. with a sufficient surety to pay it accordingly : and further that each party shall release to the other all things submitted to their award &c. And the plaintiff shews that the time for payment of part of the money awarded was past, and that the defendant had not paid that part of the money awarded to him, "nor has he given any bond for the payment of the said money, according to the form and effect of the said award;" wherefore he brought this action. The defendant pleaded that the said arbitrator did not make such award, *and this he is ready to verify* &c.; upon which the plaintiff demurs and shews for cause that the defendant ought to have concluded his plea to the country, *Quod fuit concessum* (1).

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WHORWOOD.

But it was objected that the declaration was not sufficient, because all the days of payment were not past, and also because the award was not good to award the defendant to find a surety to enter into a bond to pay the money.

Sed non allocatur ; for true it is, that the award that the defendant shall find a surety is not good (2); but the award that the defendant himself shall be bound in a bond is good enough; and the breach is assigned that the *defendant himself* has not given any bond according to the award, and no breach is assigned *for not finding a surety*; see for this Yelv. 97. (b) 19 Edw. 4. 1. (c) *contra* as it seems. Cro. Eliz. 4. (d) And as to the other objection, the court was clear that the action might be brought for such sum of money only as was due at the time of bringing the action, and the plaintiff should recover damages accordingly; and when another sum of the

(b) Martham v. Jemx. .
(c) Bro. Arbitrament 39. 51.
(a) Ecclestone v. Maliard.
If money is awarded to be paid at different

(1) For there is a complete issue between the parties, namely, a direct negative and affirmative, the declaration stating that the arbitrator *made an award*, and the plea alleging that he *made no award*, and therefore the plea ought to conclude to the country: See

ante, 190. *Roberts v. Marriett*, Com. Dig. Pleader (E. 32). 1 Saund. 103. *Hayman v. Gerrard*, note (1).

(2) S. P. 1 Roll. Abr. 2, 8. (F). pl. 2. 3 Leon. 62. *Norwich v. Norwich*. 1 Show. 82. *Thursby v. Halburt*, S. C. Carth. 159. 3 Mod. 272.

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WHORWOOD.

times, *assumpsit*
will lie on the
award for each
sum as it be-
comes due.

money awarded shall become due, the plaintiff may commence a new action for that also, and so *toties quoties*; wherefore it was adjudged for the plaintiff, and a writ of inquiry awarded,

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Case 57.

Mildmay *versus* Smith & al'.

Hil. 22 & 23 Car. II. Regis. Rot. 361.

Writ of error in
a *scire facias*
against a sheriff.

OUR lord the king has sent to his right trusty and well-beloved Sir *John Vaughan* knt., his chief justice of the bench his writ close in these words, to wit: *Charles* the 2d, by the grace of God, of *England, Scotland, France and Ireland*, king, defender of the faith &c., to our right trusty and well-beloved Sir *John Vaughan* knt. our chief justice of the bench, greeting: Because in the record and proceedings, and also in the giving of judgment, and adjudication of execution of the said judgment upon our writs of *scire facias* prosecuted by *Matthew Smith, Richard Alshorne, Hercules Horsey and Peter Petty*, against *Henry Mildmay* esq. late sheriff of the county of *Southampton*, out of our court before you and your companions our justices of the said bench, as it is said, manifest error has intervened, to the great damage of the said *Henry*, as by his complaint we are informed: We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if execution be adjudged upon our said writs of *scire facias*, then you send to us distinctly and openly under your seal, the record and proceedings thereof, with all things concerning the same, and this writ, so that we may have them on the morrow of the purification of the blessed *Mary*, wheresoever we shall then be in *England*: that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of *England*, ought to be done. Witness ourself

at *Westminster*, the 23d day of *November* in the 22d year of our reign.

Which said writ is returned in these words, to wit ;

The answer of Sir *John Vaughan* knt. the chief justice within-named :

The record and proceedings of the judgment and adjudication of execution, whereof mentioned is within made, with all things concerning the same, I send before our lord the king wheresoever &c. on the day within contained, in a certain record to this writ annexed; as within I am commanded.

Pleas at *Westminster* before Sir *John Vaughan* knt. and his companions justices of our lord the king of the bench of *Easter* term in the 22d year of the reign of our lord *Charles* the 2d. by the grace of God, of *England*, *Scotland*, *France* and *Ireland* king, defender of the faith &c. Roll. 686.

County of Southampton, to wit. The sheriff was commanded, whereas our lord the king had commanded the late sheriff of the said county by his writ, that of the lands and chattels of *Charles Sydenham* late of *London* esq., otherwise called *Charles Sydenham* of *Chichester* in the county of *Suffex*, in his bailiwick, he should cause to be made, as well a certain debt of 200l. which *Matthew Smith*, *Richard Alchorne*, *Hercules Horsey* and *Peter Petty* in the court of our said lord the now king before his justices here, to wit, at *Westminster*, recovered against him, and also sixty shillings which in the said court of our said lord the king here were adjudged to the said *Matthew*, *Richard*, *Hercules* and *Peter*, for their damages which they had on occasion of the detaining of the said debt, and that he should have the said money before the justices of our said lord the king here, to wit, at *Westminster* aforesaid, in three weeks from the day of *St. Michael* last past, to render to the said *Matthew*, *Richard*, *Hercules* and *Peter*, for the debt and damages aforesaid, whereof he was convicted : And whereupon it was considered in the same court here, that the said *Matthew*, *Richard*, *Hercules* and *Peter* should have execution against the said *Charles* of the debt and damages aforesaid by the default of the said *Charles* ; and whereupon the sheriffs of *London* return to the justices of our said lord the king here, to wit, at *Westminster* aforesaid, in three weeks of the holy *Trinity*

MILDMAY
v. SMITH.
& al'.

The chief
justice's return.

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Scire facias
against a sheriff,
to recover the
value of goods
seized by him
under a *feri*
facias, and
which he re-
turned he had
seized to a cer-
tain value, but
that they were
afterwards re-
scued from him.

Testatur.
Fieri facias.

MILDMAY
v. SMITH
& al'.

Sheriff returns
that he seized
goods under the
execution to the
value of 160l.
which were res-
cued from him.

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The return in-
sufficient.

last past, that the said *Charles* had no lands or chattels in their bailiwick, whereof they could cause to be made the debt and damages aforesaid, or any part thereof; whereupon it was testified in the same court here, that the said *Charles* had sufficient lands and chattels in the bailiwick of the said late sheriff, whereof he might cause to be made the debt and damages aforesaid. At which said three weeks of St. *Michael*, *Henry Mildmay* esq. then sheriff returned to the said justices of our said lord the king here, to wit, at *Westminster* aforesaid, that he, by virtue of the said writ to him directed, did in execution of the said writ make his warrant to F. N., T. R., and H. W. his bailiffs, to levy the debt and damages aforesaid of the lands and chattels of the said *Charles* at the suit of the said *Matthew*, *Richard*, *Hercules* and *Peter*: which said bailiffs afterwards, to wit, on the 19th day of *August* in the 21st year of the reign of our said lord the now king, took and seized into the hands of the said then sheriff the goods and chattels of the said *Charles*, to wit, 40 chaldrons of sea-coals, 30 quarters of salt, and 9 salt pans; to the value of 160l., and the said then sheriff then and there had the said goods and chattels in his hands under the custody of the said bailiffs, until *Roger Warr* and *Elizabeth* his wife, *Roger Carlyngton*, *Arthur Anvile*, otherwise *Woolgar*, *Richard Anvile* otherwise *Woolgar*, and *Nicholas Anvile* otherwise *Woolgar* afterwards, to wit, on the 20th day of *August* in the 21st year aforesaid, at *Portsea* island, with force and arms, to wit, swords, fists and clubs, took and rescued the said goods and chattels out of the hands of the said then sheriff and custody of the said bailiffs, and kept the said goods and chattels from thence until then, so that he could not cause to be made the debt and damages aforesaid, or any part thereof, of the goods and chattels aforesaid, as by the said writ he was commanded and required; and the said late sheriff further certified to the justices of our said lord the king here, that the said *Charles* had not any other or more lands or chattels in his bailiwick, whereof he could cause to be made or levied the debt and damages aforesaid: and because the return aforesaid is insufficient in law to discharge the said late sheriff, against the said *Matthew*, *Richard*, *Hercules* and *Peter*, from the value of the said goods and chattels

so as aforesaid taken in execution, and the said late sheriff had not the said 160l. before the justices of our said lord the king here, to wit, at *Westminster* aforesaid, in the said three weeks of St. *Michael*, to render to the said *Matthew*, *Richard*, *Hercules* and *Peter* in form aforesaid, nor has in any wise hitherto paid or satisfied the said 160l. to the said *Richard*, *Matthew*, *Hercules* and *Peter*, or any of them, as from the information of the said *Matthew*, *Richard*, *Hercules* and *Peter* the king has been given to understand: therefore the said then sheriff was commanded that by honest and lawful men of his bailiwick he should make known to the said late sheriff that he should be here at this day, to wit, in 15 days of *Easter*, to shew if he has, or knows of any thing, to say for himself, why the said *Matthew*, *Richard*, *Hercules* and *Peter* ought not to have execution against him of the said 160l. if it should seem expedient for him so to do &c. And now here at this day come as well the said *Matthew*, *Richard*, *Hercules* and *Peter* by *Henry Byne* their attorney, as the said *Henry Mildmay* by *John Bold* his attorney, and the now sheriff, to wit, *John Pollen* esq. now returns, that he by virtue of the said writ to him directed, by *Francis Norris* and *Thomas Ratcliffe*, honest and lawful men of his bailiwick, has given notice to the said *Henry Mildmay* the said late sheriff that he should be here on this day, to shew in form aforesaid &c. and thereupon the said *Matthew*, *Richard*, *Hercules* and *Peter* pray that execution may be adjudged to them, against the said *Henry Mildmay*, of the said 160l. for the value of the said goods and chattels so as aforesaid taken in execution &c.

And the said *Henry* says, that the said writ of *scire facias* in manner and form aforesaid obtained and sued out of the said court here, and the matter in the same continued, are not sufficient in law for the said *Matthew*, *Richard*, *Hercules* and *Peter* to have their said execution of the said 160l. maintained against him the said *Henry*, and that he, to the said writ of *scire facias* in manner and form aforesaid made, has no necessity, nor is bound by the law of the land to answer. And for causes of demurrer in law according to the form of the statute the said *Henry* shews to the court here these causes, to wit; for that it does not appear by the said writ of *fieri facias* that the

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& al.

Scire facias,

Scire faci.

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Demurrer,

Special causes of
demurrer,

said

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saïd *Henry Mildmay* had at any time the saïd 1601. or any part thereof in his hands, or the hands of any of his officers by virtue of the writ of our lord the king of *fieri facias* in the saïd writ of *scire facias* above specified; and also for that no execution ought to issue against the saïd *Henry Mildmay* on the return of the writ of *fieri facias* in the saïd writ of *scire facias* above mentioned; wherefore he prays judgment of the saïd writ of *scire facias*, and that the saïd *Matthew, Richard, Hercules* and *Peter* may be barred from having their saïd execution against him, &c.

Joinder in
demurrer.

Curia advisare
vult.

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And the saïd *Matthew, Richard, Hercules* and *Peter*, inasmuch as they have above alleged sufficient matter in law in the saïd writ to have their saïd execution in form aforesaid against the saïd *Henry* of the saïd 1601. which they are ready to verify, which saïd matter the saïd *Henry* does not deny, nor in anywise answer, but altogether refuses to admit that verification, as before, pray judgment and their saïd execution against the saïd *Henry* of the saïd 1601. to be adjudged to them &c., and because the justices here will advise of and upon the premises before they give judgment thereon, a day is therefore given to the saïd parties here until the morrow of the holy *Trinity* to hear their judgment thereon, because the saïd justices here are thereof not yet advised &c. At which day here come as well the saïd *Matthew, Richard, Hercules* and *Peter* as the saïd *Henry* by their saïd attornies; and because the justices here will further advise of and upon the premises before they give judgment thereon, a further day is therefore given to the saïd parties here until 15 days of the day of St. *Martin* to hear their judgment thereon, because the saïd justices here are thereof not yet advised &c. At which day here come as well the saïd *Matthew, Richard, Hercules* and *Peter*, as the saïd *Henry* by their saïd attornies, and because the justices here will further advise of and upon the premises before they give judgment thereon, a further day thereof is given to the parties aforesaid here until the octave of St. *Hilary* to hear their judgment thereon, because the saïd justices here are thereof not yet advised &c. At which day come as well the saïd *Matthew, Richard, Hercules* and *Peter*, as the saïd *Henry* by their saïd attornies, and thereupon the pre-
mises

Judgment for
the plaintiffs.

mises being seen and by the justices here fully understood, it seems to the justices here that the said writ of *scire facias* in manner and form aforesaid obtained and sued out of the court here, and the matter in the same contained, are sufficient in law for them the said *Matthew, Richard, Hercules* and *Peter* to have and sue out their said execution against the said *Henry* of the said 1601.; therefore it is considered that the said *Matthew, Richard, Hercules* and *Peter* have execution against the said *Henry* of the said 1601. &c.

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Afterwards, to wit, on *Wednesday* next after 15 days of *Easter* then next following, before our lord the king at *Westminster*, comes the said *Henry Mildmay* by *Robert Leek* his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, and in the said adjudication of execution on the said writ of *scire facias*, there is manifest error in this, to wit, that the writ of *scire facias* aforesaid, and the matter in the same contained are not sufficient in law for the said *Matthew Smith, Richard Alchorne, Hercules Horsey* and *Peter Petty*, to have and maintain their said execution of the said 1601. against the said *Henry*, therefore in that there is manifest error: there is also error in this, that by the record aforesaid it appears, that the judgment aforesaid was given and execution adjudged that the said *Matthew, Richard, Hercules* and *Peter* should have execution against the said *Henry* of the said 1601.; whereas by the law of this realm of *England* judgment ought to have been given that the said *Matthew, Richard, Hercules* and *Peter* should take nothing by their said writ, but be in mercy for their false claim; and therefore in that there is manifest error. And the said *Henry* prays the writ of our said lord the king to warn the said *Matthew, Richard, Hercules* and *Peter* to be before our lord the king wheresoever &c. to hear the record and proceedings aforesaid; and it is granted to him &c. by which it is commanded the sheriff that, by honest and lawful men of his bailiwick, he make known to the said *Matthew, Richard, Hercules* and *Peter* that they be before our said lord the king in five weeks from the day of *Easter* wheresoever &c. to hear the record and proceedings aforesaid, if &c. and further to do and receive what the

Assignment of
general errors.

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*Scire facias ad
audiendum
errores.*

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*Vicescomes non
misit breve.*

*In nulla est er-
ratio.*

the said court of our said lord the king shall consider of him in his behalf; the same day is given to the said *Henry* &c. at which day, before our said lord the king at *Westminster*, comes the said *Henry* by his attorney aforesaid, and the sheriff has not sent the writ thereof; and the said *Matthew*, *Richard*, *Hercules* and *Peter* being solemnly called, come by *John Cowper* their attorney; whereupon the said *Henry*, as before, says, that in the record and proceedings aforesaid and also in giving the judgment aforesaid, and in the said adjudication of execution upon the said writ of *scire facias*, there is manifest error, by alleging the said errors by him in form aforesaid alleged; and he prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, and that the said *Matthew*, *Richard*, *Hercules* and *Peter* may rejoin to the said errors, and that the court here may proceed to examine as well the record and proceedings aforesaid, as the said matters above for error assigned. And the said *Matthew*, *Richard*, *Hercules* and *Peter* say, that there is not any error either in the record or proceedings aforesaid, or in giving the said judgment; and they likewise pray that the court of our said lord the now king here may proceed to examine as well the record and proceedings aforesaid, as the said matters above assigned for error, and that the judgment aforesaid may be in all things affirmed, &c.

Mildmay *versus* Smith & al'.

Case 57.

Hil. 22 & 23 Car. 2. Regis.

ERROR by *Mildmay* late sheriff of the county of *Southampton* against *Smith* and others on a judgment given in the common bench in a *scire facias* brought by *Smith* and the other plaintiffs against the said *Mildmay* defendant, who shewed this matter, namely, that a *fiery facias* was sued out by the plaintiffs, against one *Sydenham*, to levy a debt of 200l. with costs of suit, directed to the sheriff of the county of *Southampton*, and that the defendant *Mildmay*, then being sheriff of the said county, returned on the said writ, that he had made a warrant to his bailiffs who had seized divers goods of the said *Sydenham* to the value of 160l. and that they were rescued out of their custody, so that he could not levy the debt, and that the said *Sydenham* had no other goods whereof he could levy it. And the plaintiffs by their *scire facias* suggested that the said 160l. was not paid to them, wherefore they brought their *scire facias* to have execution of the money against the said sheriff; upon which *scire facias* the said *Mildmay* the sheriff demurred in law. And in the common bench judgment was given for the plaintiffs, that they should have execution against the said sheriff being defendant of the said 160l.: on which a writ of error was brought.

And now this term the judgment was affirmed by *Male* chief-justice, *Twyssden* and *Rainsford* justices, *Moreton* being absent on account of illness; and it was argued in *Trinity* term before, and in this term, by *Winnington* and *Saunders* on the part of the plaintiff in the writ of error, that this *scire facias* does not lie because the sheriff will be charged with the precise sum of the value which he has returned the goods to be, when perhaps they may be of less value after the seizure, although they were of the value returned at the time they were seized, especially if they were perishable goods, or live cattle which might die, without any fault in the sheriff, as by murrain or other casualty. But perhaps an action of debt

S. C. 2 Keb.
789. 821.
If a sheriff suffers goods seized under an execution, and returned by him of such a value, to be rescued out of his hands, a *scire facias* lies to have execution against him, of the money according to the value returned.

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(1) See 2 Black.
Rep. 1221.
Aylett v. Lowe,
and Dougl. 6.
Walker v. Wit-
ter, S. P.

(b) Coriton v.
Thomas.
(c) Sly v. Finch.
(d) S. C.

debt may lie upon this return, for then on *nil debet* pleaded the defendant may be at liberty to give in evidence that the goods were of less value, and the jury may find for the plaintiff for so much as the less value amounts unto, and acquit the defendant of the residue (1): (but *quare* of this how it can be, for the record is intire, and *nil debet* is no plea against a record (2) or specialty.) And it was further argued that the sheriff is in no case chargeable for the debt on a *fieri facias* unless he returns that he has the money in his hands, and not where he has goods to the value &c. Cro. Jac. 566 (b). Cro. Jac. 514 (c). and Godbolt 276 (d).

Sed non allocatur; For the sheriff by his return of the rescue has put the plaintiffs to the end of their suit; for they cannot sue a new execution except only for the surplus of their debt over and above the 16cl.; and the court cannot award a *venditioni exponas* because it appears that the goods are out of the sheriff's hands, 34 H. 6. 36. a. Therefore the plaintiffs ought to have a writ of debt, or *scire facias*, on the return against the sheriff, as here, or otherwise they are without remedy (3). And by the seizure of the goods in execution the sheriff has a property in them, so that he may reseize them, and sell them as well when he is out of his

(2) For the sheriff's return on the writ of *fieri facias* is parcel of the record, and therefore an action of debt upon it is founded on a record, to which *nil debet* is no plea. See 1 Saund. 38. *Jones v. Pope*, note (3): *Ante*, 297. note (1). But if the sheriff has made no return, and debt be brought against him for the money he has actually received, which may be done, then *nil debet* is a good plea; for the record in that case is only *inducement*, and a matter of fact, namely, the receipt of the money, is the *foundation* of the action. Cro. Car. 539 *Perkinson v. Gilford*.

(3) And Lord Holt is to the same effect in *Clerk v. Withers*. 2 Ld. Raym.

1075. "The sheriff is answerable for
" the value of the goods after he has
" seized them, and is bound to sell
" them at all events, and is bound
" to the value he has returned them to
" be of. And though the goods are
" lost, or rescued from him, he is bound
" not to that value they may after ap-
" pear, or be found to be of, but to the
" value he returned them to be of;
" that is the value he is bound to, and
" an action of debt lies against him for
" that value; and that is the case in 2
" Saund. 343. *Mildmay v. Smith*; and
" by the same reason he is compellable
" to sell them according to that value."

See *ante* 47 a. note.

office as before. *Ayre v. Aden*, Cro. Jac. 73. and *Moor* 757.; the roll of which is, as *Hale* chief-justice said, in *Easter* 44 Eliz. Roll. 618 (3). But true it is, if the sheriff do not misbehave himself, he is not chargeable in debt or *scire facias*, unless it appears by his return that he has the money in his hands; as if he returns, "I have taken and caused to be seized into my hands goods and chattels to the value of 160l. which remain in my hands for want of buyers," there on this return he is not chargeable in debt or *scire facias* because he has not misbehaved himself, but has done his duty, for there is no default in him; but it is otherwise here, for he has suffered the goods to be rescued out of his hands, which is a great fault in him; wherefore the judgment was affirmed as aforesaid. See Cro. Jac. 514 (f). Godbolt, 176 (g). Cro. Car. 539 (b). See *ante*, 71 b. note.

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(3) See *ante*, 47.
Wilbraham v.
Show.

(f) *Sly v.*
Finch.

(g) *S. C.*
(h) *Parkinson*
v. Gifford.

DE

Term. Sanctæ Trin.

Anno Regni Regis, Car. II. 23.

Case 58.

Peeters *versus* Opie.

Hil. 23 Car. 2. Regis. Rot. 319.

S. P. 1 Mod.
Ent. 183.Declaration in
assumpsit.
1st count.

Plaintiff a mason, and in consideration he would do certain work for the defendant, he promised to pay him 30s.

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CORNWALL, to wit. Be it remembered that heretofore, to wit, in *Easter* term last past, before our lord the king at *Westminster* came *Stephen Peeters* by *Richard Halse* his attorney, and brought here into the court of our said lord the king then there his certain bill against *Richard Opie* gent. in the custody of the marshal &c. of a plea of trespass on the case, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit : *Cornwall* to wit, *Stephen Peeters* complains of *Richard Opie* gent. being in the custody of the marshal of the marshalsea of our lord the king before the king himself, for that whereas the said *Stephen*, on the 1st day of *September* in the 22d year of the reign of our lord *Charles* the 2d. now king of *England* &c. and long before, was and yet is a mason ; and whereas also afterwards, to wit, on the day and year aforesaid, at *Bodmyn* in the said county, in consideration that the said *Stephen*, at the special instance, and of the said *Richard Opie*, would build and erect for the said *Richard* the walls of three houses for pigs, and would cleanse and build the walls of the said houses for the said *Richard*, he the said *Richard* undertook and then and there faithfully promised the said *Stephen* that he the said *Richard* would

would well and faithfully pay and satisfy the said *Stephen* thirty shillings of lawful money of *England* when he should be thereunto afterwards requested. And the said *Stephen* in fact says that he the said *Stephen* afterwards, to wit, on the 2d day of *October* in the said 22d year of the reign of our said lord the now king, at *Bodmyn* afore said, did build and erect for the said *Richard* the walls of the said three houses, and did likewise cleanse and build the walls of the said houses.

And whereas also afterwards, to wit, on the 4th day of *October* in the 22d year of the reign of our said lord the now king, at *Bodmyn* afore said, a certain discourse was had and moved between the said *Stephen* and the said *Richard*, as well concerning the pulling down and prostrating the walls of the houses of the said *Richard* before then built, as concerning the building and erecting of a malt-house and an out-house called a linny or dry-house in the places in which the walls of the said houses were built: whereupon afterwards, to wit, on the day and year last mentioned, at *Bodmyn* afore said in the county afore said, it was agreed between the said *Stephen* and the said *Richard*, that the said *Stephen* should pull down and prostrate the walls of the said three houses before then built and erected as afore said, and in the places in which the said walls were erected should build for the said *Richard* a malt-house and an out-house called a linny or dry-house for the said *Richard*, and should cover the said malt-house and out-house with flates, or raggs, and that the said *Richard* should pay to the said *Stephen* for his labour in and about the pulling down and prostrating of the said walls, and the erecting and building of the said malt-house and out-house, 8l. of lawful money. And thereupon afterwards, to wit, on the day and year last mentioned, at *Bodmyn* afore said, in consideration that the said *Stephen*, at the special instance and request of the said *Richard*, undertook, and then and there faithfully promised the said *Richard* to perform the said agreement in all things on the part of the said *Stephen* to be performed according to the form and effect of the said agreement, he the said *Richard* undertook and then and there faithfully promised the said *Stephen* that he the said *Richard* would well and faithfully perform the said agreement in all things on the

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Averment that
plaintiff did the
work.

2d count.

It was agreed
between plaintiff
and defendant,
that plaintiff
should do other
work for defend-
ant, for which he
was to pay him
8l.

Mutual pro-
mises.

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* Plaintiff was ready and offered to perform the agreement on his part. Breach.

part of the said *Richard* to be performed. And the said *Stephen* in fact says, that he, always from the time of making the said agreement hitherto, *was ready and offered to perform the said agreement in all things on his part to be performed*, yet the said *Richard* not regarding his said several promises and undertakings, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Stephen* in this behalf, has not paid to the said *Stephen* either the said 30s. first above mentioned, or the said 8l. in the said agreement above specified, amounting in the whole to 9l. 10s., or any part thereof, nor has in any wise satisfied him for the same, (although to do this he the said *Richard* afterwards, to wit, on the 1st day of *March* in the 23d year of the reign of our said lord the now king, at *Badmyn* aforesaid in the county aforesaid, was requested by the said *Stephen*,) but the said *Richard*, to pay to the said *Stephen* the said 9l. 10s. or in any wise to satisfy him for the same, has hitherto altogether refused, and still does refuse, to the damage of the said *Stephen* of 20l. and therefore he brings suit &c.

Plea.

Non assumpsit.

And now at this day, to wit, on *Friday* next after the morrow of the holy *Trinity* in this same term, until which day the said *Richard Opie* had leave to imparl to the said bill and then to answer, before our lord the king at *Westminster* comes as well the said *Stephen* by his said attorney, as the said *Richard Opie* by *John Tremayne* his attorney; and the said *Richard Opie* defends the wrong and injury when &c. and says that he did not undertake in manner and form as the said *Stephen* above complains against him, and of this he puts himself upon the country, and the said *Stephen* thereof likewise &c.; therefore let a jury thereupon come before our said lord the king at *Westminster*, on *Wednesday* next after three weeks of the holy *Trinity*, by whom &c. and who neither &c. to recognize &c. because as well &c. the same day is given to the parties aforesaid there. Afterwards the process thereof is continued between the parties aforesaid of the plea aforesaid, by the jury being respited between them, before our said lord the king at *Westminster*, until *Monday* next after three weeks of *St. Michael* thence next following, unless his majesty's justices assigned to take the assizes in the county aforesaid shall first

Venire awarded.

Processu continuato.

Nisi prius.

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come on *Tuesday* the 22d day of *August* at *Launceston* in the said county, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear: At which day, before our said lord the king at *Westminster*, comes the said *Stephen* by his attorney afore-said; and the said justices of our said lord the king of assize, before whom the said issue was tried, have sent hither their record had before them in these words, to wit: Afterwards, *Postea* on the day and at the place within contained, before Sir *John Vaughan* knt. chief justice of our said lord the king of the bench, and *Lawrence Swanton* esq. for this time associated to the said Sir *John Vaughan* and Sir *Richard Rainsford* knt. one of the justices of our said lord the king assigned to hold pleas before the king himself, justices of our said lord the king, assigned to take the assizes in the county of *Cornwall*, according to the form of the statute &c., the presence of the said Sir *Richard Rainsford* not being expected, by virtue of his said majesty's writ of *fi non omnes*, comes the within-named *Stephen Peeters* by his attorney within mentioned, and the within-named *Richard Opie* gent. although solemnly required, comes not, but makes default; therefore let the jurors of the jury, whereof mention is within made, be taken against him by default; and the jurors of that jury being summoned, some of them, that is to say, M. R. and T. M. come and are sworn upon that jury; and because the residue of the jurors of the same jury do not appear, therefore others of the by-standers *Tales.* are appointed anew by the sheriff of the said (1) county, whose names

Defendant makes
default.

(1) There seems to be an omission here of some essential words: The usual form of the entry of the *tales*, after the word *by-standers*, is this; "being chosen by the sheriff of the county aforesaid, at the request of the said (either plaintiff, or defendant) and by the command of the said justices, are appointed anew," &c., which form appears to be material and necessary, for a *tales* can only be ap-

pointed at the request of one of the parties, as appears by the statute 35 H. 8. c. 6. hereafter mentioned; and if neither of the parties requests a *tales*, the cause must go off for want of jurors. As where the defendant's counsel perceiving a mistake in the record whilst the jury were swearing, said they would make no defence; upon which the plaintiff's counsel, in order to avoid a nonsuit and to save the costs, refused to pray

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names are annexed to the within-written panel, according to the form of the statute in such case made and provided; which said jurors so appointed anew, that is to say, T. L., J. G., J. V., J. D., R. D., J. P., H. W., J. P., J. F., and J. C. being called likewise come, who, together with the said other jurors before impanelled and sworn, being chosen, tried and

pray a *tales*; and though twelve had been sworn, yet there Having been no actual prayer of a *tales*, the cause was suffered to remain for want of jurors. 1 Str. 707. *Jenkins v Purcell*.

At common law, if a sufficient number of jurymen did not appear at the trial, or so many of them were challenged and set aside, that the remainder would not make up a full jury, there issued a writ to the sheriff, of *undecim. decem et octo tales*, according to the number that was deficient, in order to complete the jury, and which must be still so done on a trial at bar, if the jurors make default. Gilb. H. C. P. 73. 3d edit. 3 Black. Comm. 364. 5 Term Rep. 457. 458. 462. *The King v. Perry*. But now by the said statute 35 H. 8. c. 6. s. 6, 7, 8. (extended to *qui tam* actions by the 4 & 5 Ph. and M. c. 7. and to the courts of great sessions in *Wales* and counties palatine, by statute 5 Eliz. c. 25. s. 2.) "in every writ of "*habeas corpora* or *disstringas* with a *nisi prius*, where a full jury shall not appear before the justices of assize or "*nisi prius*, or else after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, that then the same justices upon request made by the plaintiff or defendant, shall have authority to command the sheriff, or other minister to whom

"the making of the return shall appertain, to name and appoint as often as need shall require, so many of such other able persons of the said county, then present at the said assizes or *nisi prius*, as shall make up a full jury; which persons shall be added to the former panel. and their names annexed to the same; and that the parties shall have their challenges to the jurors so named, added and annexed to the said former panel, as if they had been impanelled upon the *venire facias*; and that the said justices shall and may proceed to the trial of every issue with those persons that were before impanelled and returned, and with those newly added and annexed to the said former panel, in such wise as they might or ought to have done, if all the said jurors had been returned upon the writ of *venire facias*; and that every such trial shall be as good and effectual in the law, to all intents and purposes, as if such trial had been had by twelve of the jurors impanelled and returned upon the writ of *venire facias*;" and by statute 7 and 8 W: 3. c. 32. s. 3. the sheriff is directed to return such persons to serve upon the *tales* as shall be returned upon some other panel and then attending the court. Hence it is usual to draw their names out of the box, though by consent the sheriff may return such other

and sworn to speak the truth of the matters within contained, say upon their oath that the said *Richard Opie* did undertake in manner and form as the said *Stephen Peeters* within complains thereof against him; and they assess the damages of the said *Stephen Peeters* on the occasion within specified, over and above his costs and charges by him about his suit in this behalf expended to 4l. and for those costs and charges to 40s.; therefore it is considered that the said *Stephen Peeters* do recover against the said *Richard Opie* the said damages by the jurors aforesaid in form aforesaid assessed, and also 10l. for his said costs and charges, by the court of our said lord the king now here adjudged of increase to the said *Stephen* with his assent; which said damages, costs and charges in the whole amount to 101. and the said *Richard* in mercy &c.

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Verdict for
plaintiff.

Judgment.

persons as can be procured, and after a juror has been challenged on the principal panel, he ought not to be sworn

as a talefman. 1 Str. 640. *Parker v. Thoroton*, 2 Ld. Raym. 1410. S. C.

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Case 58.

Trin. 23 Car. 2. Regis. Rot. 319.

ASSUMPSIT. 'The plaintiff declares that it was agreed between the plaintiff and defendant, that the plaintiff should pull down and prostrate the walls of three houses, and in the places in which the said walls were erected should build for the said defendant a malt-house, and a linny or dry-house, and cover them with slate or tile, and that the said defendant should pay to the said plaintiff for his work in and about the pulling down and prostrating the said walls and building and erecting the said malt-house and linny-house 8l. of lawful money &c. And then the plaintiff lays mutual promises, namely, that in consideration that the plaintiff had undertaken to perform his part of the said

S. C. 2 Lev. 23.
1 Vent. 177.
214. 2 Keb.
811. 837 S. C.
cited 12 Mod.
530. 2 Salk.
623. 1 Ld.
Raym. 687.
Com. Rep. 117.
S Term Rep. 366.
An agreement
was that the
plaintiff should
build a house,
and that the de-
fendant should
pay him so much
money for it.
The plaintiff
averred that

was ready and offered to perform his agreement; the better opinion was that the agreement was not sufficient, but held well after verdict.

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agreement, the defendant promised to perform the said agreement on his part to be performed; and the plaintiff also lays another promise in his declaration, and then he makes this averment, namely, "And the said plaintiff in fact says that he always from the time of making the said agreement hitherto *was ready and offered to perform* the said agreement in all things on his part to be performed, yet the said defendant" has not paid the 8l. nor the other sums of money contained in the other promise, to the plaintiff's damage (2) of 20l.: The defendant pleads *non assumpsit*, and the issue was found for the plaintiff on both pro s, and intire damages assessed.

And now in this term *Saunders* moved in arrest of judgment that the plaintiff has not well intitled himself to the action on the said promise for want of averring that he has performed the work which he was to do, or that he was prevented from doing it by the defendant; for he only says that *he was ready and offered*, but he does not say, that he performed, or that he was hindered or prevented by the plaintiff from doing it. And therefore he ought not to have the 8l. for he was to have it *for his labour, &c.* which implies that he first ought to do the work before he can demand his wages for

(2) There seems to be no doubt that the present form of declaring would be an *indebitatus assumpsit* for work and labour, in which it is incumbent on the plaintiff to prove *the work and labour performed* to intitle himself to the action. But at the time this case was decided, it was thought that the manner and nature of the work and labour should be specially set forth in the declaration, and it was not until some time after that a general *indebitatus assumpsit* was held to be maintainable. This appears from the case of *Hibbert v. Courthope*. Carth. 276. Skin. 409. East. 5 W. where in error it was insisted that the declaration was general, namely, that the defendant was indebted to the plaintiff in so much

money for the work and labour of the plaintiff before that time done and performed for the said defendant at his special instance and request, without setting forth what sort or manner of work it was; but the objection was disallowed by the court, who said that the only reason, why the plaintiff is bound to shew wherein the defendant is indebted, is, that it may appear to the court that it is not a debt on record or specialty, but only upon simple contract; and any general words, by which that may be made to appear, are sufficient. S. P. 1 Sid. 425. *Ruffel v. Collins*. S. C. 1 Mod. 8. 1 Vent. 44. See 2 Str. 933. *Hayte v. Warren*, and 1 Saund. 269. *Osborne v. Rogers*, note (2).

his

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his labour. For though it be laid by way of agreement and mutual promise, yet it appears by the very agreement itself that the plaintiff was to do the work and to have the 8l. *for his work*; and therefore the mutual promise is only to perform the agreement, which the defendant has not broken on his part by the non-payment of the said 8l., if the plaintiff has not performed the work, which was to be precedent to the payment of the money. And although the plaintiff has laid it by way of mutual agreement, yet in fact it is no more than that the defendant desired the plaintiff to do the work, and he would pay him 8l. for it, which is a common contract between parties; and the meaning of it is that the work should be done first before payment: for the party who is to pay the money does not intend to pay it unless the work be performed; he does not mean to pay his money, and then to bring an action for not performing the work against one who perhaps is not responsible, or after he has got the money, will run away; but if the plaintiff has offered to do the work and the defendant has hindered him, the defendant will be in such case bound to pay the money, because he ought not to take advantage of his own wrong. And therefore the judgment was staid until it should be moved on the other side.

And afterwards at another day *Pollexfen* moved for judgment for the plaintiff, because, as he said, there was here a promise on each side, and if the plaintiff has not performed the agreement on his part the defendant has remedy against him by action; and here the agreement is not that the money is to be paid after the work is done, but it is to be paid generally whether the work be done or not, but if the work is not done the defendant has his remedy on the promise as aforesaid, and therefore he prayed judgment for the plaintiff.

And *Twyfden* justice was of opinion that the plaintiff should have judgment for the reason given by *Pollexfen*; and also because the words *for his labour* are no more than what the law would have implied. And he said that if the agreement had been that the plaintiff should do the work and the defendant should pay the plaintiff 8l. without saying *for his work*, there had been no doubt that the plaintiff might maintain an

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action for the money although he had not done the work ; yet the law implies that the 8l. was to be paid *for his work*, and therefore the addition of the words *for his work* will not alter the case at all, for they would be intended if they had been omitted, *et expressio eorum quæ tacitè insunt nihil operatur* : wherefore he concluded that the plaintiff ought to have his judgment.

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Hale chief-justice *contrà* ; and that the declaration was insufficient, and judgment should be arrested ; for he said that the words *for his labour* make a condition precedent, so that the plaintiff ought of necessity to have the work done, or at least that he was hindered from doing it by the plaintiff, before he can demand the money. And he further said that if the said agreement had been put into writing under the seals of the parties, it had been clear that the plaintiff could not maintain an action of covenant for the 8l. without such an averment ; and no more can he do so here ; and although there were mutual promises in the case, yet the defendant's promise was on the performance of the agreement, which in itself was only conditional on the defendant's part, namely, that if the plaintiff performed the work, then the defendant was to pay him 8l. *for his labour*, but otherwise not ; and here it appears that the plaintiff has not performed the work ; wherefore the defendant is not bound to pay him the 8l. notwithstanding the mutual promise. But he said, that if by the agreement it had been that the 8l. should be paid on any certain day (a), perhaps the law would be otherwise ; because then it might be construed that the defendant relied on the plaintiff's mutual promise for his security ; but here no certain time being limited when the money should be paid, the law makes a construction that it shall be paid when the work will be finished and not before, unless the defendant himself was the cause why it was not finished, which does not appear here in this record.

Rainsford justice agreed with *Hale* ; *Morton* justice being absent on account of ill health ; wherefore the judgment was not absolutely arrested, but the plaintiff had leave to move it again ; but his counsel perceiving the opinion of *Hale* and *Rainsford*, did not move it again, and consequently judgment

was

(a) *Portage v. Cole, 1 Saund. 320. note.*

was arrested. Vide Co. Lit. 204. a. that the word *pro* makes a condition in things executory, &c.

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Afterwards in *Trinity* term in the 24th year of the now king it was moved again; and *Twydden* retaining his former opinion, the court gave judgment for the plaintiff, because then *Hale* chief-justice and the other judges held, that "*he was ready and offered to perform &c.*" was a sufficient averment after verdict (3). *Quod nota.*

(3) See 1 Saund. 320. *Portage v. Cole*. note (4). So where in *assumpsit* the declaration stated that the defendant, in consideration the plaintiff would pay him a certain sum of money, promised to assign him a term, and the plaintiff averred that he offered the money, but the defendant did not assign; after verdict it was moved in arrest of judgment that the plaintiff should also have also averred that the defendant *refused* the money when offered; but it was held by the court, that though the declaration would have been bad on demurrer for that omission, yet after verdict it was well enough. 1 Sid. 13. *Ball v. Peake*, S. C. cited by Holt C. J. in 12 Mod. 530. *Lancashire v. Killingworth*, and 1 Ld. Raym. 686. S. C. See Cro. Eliz. 888. *Lea v. Laxelby*. The principle of all the cases upon this head seems to be, that where the plaintiff himself is to do an act to intitle himself to the action, he must either shew the act done, or if it be not done, at least that he has performed every thing that was in his power to do. Com. Rep. 117. *Lancashire v. Killingworth*.

The nature and necessity of such averments was much considered in a late case; which was *assumpsit* for the non-delivery of 100 quarters of malt, which the defendant had undertaken to deliver on request at a certain price,

and the plaintiff averred that although afterwards, to wit, on &c. at &c. he requested the defendant to deliver to him the 100 quarters of malt, and was then and there *ready and willing to pay the said defendant for the same*, according to the terms of the said sale, and although he was then and there *ready and willing, and offered to accept and receive* the said 100 quarters of malt from the defendant, yet he refused to deliver them. After verdict for the plaintiff it was moved in arrest of judgment, that the plaintiff did not aver *the actual tender of the price agreed upon*, the averment of a readiness and willingness only in the plaintiff to pay not being sufficient. But the court over-ruled the objection, and held the averment of the plaintiff's readiness and willingness to pay for the malt sufficient,—that under that averment the plaintiff was bound to prove that he was prepared to pay or tender the money, if the defendant had been ready to receive it, and to deliver the malt; and that all that was necessary for the plaintiff to shew was, that he was ready to pay the price, provided the defendant was ready to deliver the malt; and Clift. 97. pl. 82. (expressly in point,) Plow. 180. *Norwood v. Read*, and *Hearne*. 131. were cited. 1 East's Rep. 203. *Rawson v. John*.

So where in *assumpsit* the declaration stated that the plaintiff bargained with the defendant to buy of him, and the defendant agreed to sell to the plaintiff, a quantity of oats at the price of 21 shillings *per* quarter, to be delivered any time between *Michaelmas* 1799, and *Lady-day* 1800; and in consideration thereof the plaintiff undertook to accept and receive the oats, and pay for them at the above-mentioned price, and the defendant undertook to deliver them some time before the above-mentioned days; “and although the said defendant afterwards did in part performance of his said promise deliver to the plaintiff a part of the said oats, and although the time for the delivery of the residue of the said oats to the said defendant, according to the defendant’s promise aforesaid, had long since elapsed, and the plaintiff was for and during all that time, and still is ready and willing to accept and receive the residue of the said oats, and to pay for the same at the rate or price aforesaid, yet the defendant had not delivered.” After verdict for the plaintiff, it was objected in arrest of judgment, that it was not averred in the declaration, that the plaintiff had performed &c.; but the court, on the authority of the last cited case of *Rawson v. Johnson*, held that the averment of the plaintiff’s readiness and willingness to pay for the article to be delivered by the defendant, without any allegation of an actual tender of the money, was sufficient. 2 Bos. & Pull. 447. *Waterhouse v. Skinner*. These cases seem to be just the converse of the principal case. If the defendants in these cases had sought

to recover the price of the malt or oats, which they had agreed to sell to the plaintiffs, as *Peeters* did the price of the work in the principal case, they must have averred the delivery of the malt or oats, or an offer to deliver the same, and a refusal to receive and pay.

But the plaintiff must aver *a readiness to perform* his part of the contract, by stating that he was ready and willing to pay on delivery; for if there be no averment whatever of that kind, the declaration is insufficient. As where in *assumpsit*, the declaration stated that in consideration that the plaintiff had bought of the defendant 200 quarters of wheat at a certain price, the defendant undertook to deliver the wheat at a certain place in one month from the sale; and then the plaintiff averred, that although *he was always*, from the time of making such sale for one month, *ready and willing to receive the wheat*, yet the defendant did not deliver it. After verdict for the plaintiff it was objected in arrest of judgment, that the declaration was bad, because it was not averred that the plaintiff had either tendered to the defendant the price of the wheat, *or was ready to have paid for it on delivery*; for when something is to be done by both parties to a contract at the same time, there the party, suing the other for non-performance on his part, must aver an offer at least, at the same time to perform what was to be done by himself: to which the court agreed, and held the declaration bad, and arrested the judgment; being of opinion, that where two concurrent acts are to be done, the party, who sues the other for non-performance, must aver that he

has performed, or was ready to perform, his part of the contract ;—that the plaintiff could not impute to the defendant the non-delivery of the wheat, without alleging *that he was ready to pay the price of it* ; and that it was distinguishable from this case in *Saunders*, where the party was to pull down a wall, and was then to be paid for it : there was no doubt but the pulling down of the wall was a condition precedent to the payment ; the act was to be done, and then the price was to be paid for it. 7 Term Rep. 125. *Morton v. Lamb*. So it is with respect to agreements under seal ; the party who seeks satisfaction from another for non-performance of his part of the agreement, must shew in his declaration that he has performed, or at least offered to perform, the agreement on his part. As where in covenant, the declaration stated that, by articles of agreement under seal, the plaintiff covenanted and agreed to convey, on or before the 1st of *August* 1797, to the defendant a school-house and ground, and, on or before the 24th of *June* 1796, to surrender up the premises, and deliver over the scholars, as far as in him lay, to the defendant ; and *in consideration thereof* the defendant covenanted to pay, on or before the said 1st day of *August* 1797, the plaintiff the sum of 120l. ; the plaintiff then averred that he surrendered up the premises to the defendant, who entered and was possessed, and delivered over the scholars as far as in him lay, and although he had well and truly performed the said articles, yet the defendant had not paid the said 120l. The defendant pleaded that he was always ready to accept a conveyance of

the said premises, and at the same time to pay the said 120l. to the plaintiff, if he would have made such a conveyance ; but the plaintiff did not, on or before the said 1st of *August*, or ever since, convey the said premises to the defendant. Upon a demurrer to this plea, it was contended that the covenants in this case were independent, and therefore it was not necessary, in order to maintain the action for the 120l., for the plaintiff to aver the execution or tender of a conveyance, on or before the said 1st day of *August* 1797, and consequently the allegation of the non-performance of those acts by the defendant in his plea, was no bar to the plaintiff's recovery ; and 1 Salk. 171. *Thorpe v. Thorpe*. 6 Term Rep. 570. *Campbell v. Jones*, and *Boone v. Eyre*. 1 H. Black. 273. note (a), were cited. But the court was of a different opinion, and held that they were dependent covenants, and the making of the conveyance was the consideration of the plaintiff's title to receive the money ; that the execution of the conveyance, and the payment of the money, were concurrent acts ; that according to the rule laid down in *Kingslon v. Preston* cited in Dougl. 689. *Jones v. Barkley*, no person can call upon another to perform his part of the contract, until he himself has performed all that he has stipulated to do as the consideration of the other's promises ; which rule applies to every case of a sale of property, where one engages to convey on a certain day, and the other to pay at the same time ; and that in neither case will the court compel one party to perform his part until the other has done, or offered to do, his own ; and that

payment

payment in this case could not be enforced until a conveyance was made, or at least offered to be made by the plaintiff. That as to the case of *Poone v. Eyre*, the judgment of the court went on the ground that, in the form the breaches were assigned, the plea did not necessarily go to the whole of the consideration; but if the plea had been that the plaintiff had no title at all to the plantation itself, it seems that it would have been a sufficient bar to the action. And the court gave judgment for the defendant. 8 Term Rep. 366. *Glazebrook v. Woodrow*.

This case determined since the publication of the first volume of these Reports, seems strongly to fortify and confirm the observations which were submitted in note (4) in the case of *Pordage v. Cole*. 1 Saund. 320. and will serve very much to explain some of the distinctions that are taken in it.

And where in covenant against a lessee for not repairing, the declaration stated, that by a certain indenture of demise, the defendant covenanted to repair the demised premises, and at the end of the term to surrender up the same in good and sufficient repair, the

plaintiff *the lessee, finding, allowing, and assigning* timber sufficient for such reparations, to be cut and carried by the defendant the lessee; and then the plaintiff averred that the defendant did not repair the premises, nor surrender them at the end of the term in good and sufficient repair. The defendant pleading that the plaintiff did not find, allow or assign timber sufficient for repairing the said premises and keeping them in repair; and on demurrer it was adjudged that the finding of the timber was a condition precedent, and consequently the breach of it was a bar to the action; for the finding of timber was a thing in its nature necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant, who could not repair until timber was assigned him for repairs; and therefore as that was a condition precedent, the plaintiff ought to have averred in his declaration the performance of such condition. Willes's Rep. 496. *Thomas v. Cadwallader*. See 2 H. Black. 123. *Philips v. Fielding*. Ibid. 178. *French v. Campbell*. *Antea* 107. *Holdipp v. Otway*. 155. *Hunlock v. Blacklowe*. "

Sacheverell *versus* Froggatt.

Case 59.

Pasch. 23 Car. 2. Regis. Rot. 590.

DERBYSHIRE, to wit. Be it remembered that heretofore, to wit, in *Easter* term last past, before our lord the king at *Westminster* came *Thomas Sacheverell* esq. by *Ralph Gregge* his attorney, and brought here into the court of our said lord the king then there his certain bill against *Thomas Froggatt* of *Bubnell* in the said county, merchant, otherwise called *Thomas Froggatt* of *Bubnell* in the county of *Derby*, lead-merchant, in the custody of the marshall &c. in a plea of breach of covenant, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit: *Derbyshire*, to wit, *Thomas Sacheverell* esq. complains of *Thomas Froggatt* late of *Bubnell* in the said county, merchant, otherwise called *Thomas Froggatt* of *Bubnell* in the county of *Derby*, lead-merchant, being in the custody of the marshal of the marshalsea of our lord the king before the king himself, in a plea of breach of covenant, for that whereas one *Jacynth Sacheverell* esq. in his life-time was seised of the manor of *Stoake* with the appurtenances in the said county, and of a smelting-mill, and all that parcel of land called the *Toadpool* with the appurtenances, in the parish of *Stoake* in the said county, near adjoining to the said manor or lordship of *Stoake*, in his demesne as of fee; and being so seised thereof the said *Jacynth* afterwards, to wit, on the 10th day of *April* in the year of our lord 1656, at the said parish of *Stoake*, by his certain indenture then and there made by him the said *Jacynth Sacheverell*, by the name of *Jacynth Sacheverell* of *Morley* in the county of *Derby* esq. of the one part, and the said *Thomas Froggatt*, by the name of *Thomas Froggatt* of *Bubnell* in the said county of *Derby*, lead-merchant, of the other part, (one part of which said indenture sealed with the seal of the said *Thomas Froggatt*, he the said *Thomas Sacheverell* brings here into court, the date whereof is the same day and

Covenant by an assignee of the reversion against the lessee for non-payment of rent.

J. S. seised of certain premises in fee,

by indenture;

Profert.

• year

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Demised them
to the defendant.
(b) See ante, 305.
note (13).

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Habendum for
21 years.

Yielding during
the term 119l.
a-year payable
half-yearly.

year aforesaid) demised, leased, set and to farm let to the said *Thomas Froggatt* the manor and mill aforesaid with the appurtenances, *by the names (b)* of all that manor or lordship of *Stoake* in the said county of *Derby*, with the rights, members, and appurtenances thereof, and of all the lands, tenements and hereditaments thereunto belonging, together with a smelting-mill, (excepting and always reserving out of the said lease all the lands, tenements and hereditaments, ways, waters, easements, commons, profits, commodities and appurtenances whatsoever, which then were in the possession of *Robert Ashton* of *Stony Middleton* in the said county, gent. or which theretofore had been in the possession of *Robert Ashton* deceased, late father of the said *Robert Ashton* of *Stony Middleton*, and also excepting and reserving out of the then present demise, the chief-rent, services and perquisites of courts of or belonging to the said manor or lordship,) and the said *Jacinth Sacheverell* did likewise by the said indenture demise, lease, set and to farm let unto the said *Thomas Froggatt*, the said parcel of land called the *Toadpool* with the appurtenances, *by the name (b)* of all that parcel of land or ground called the *Toadpool* with the appurtenances near adjoining to the said manor or lordship of *Stoake*, and which the said *Jacinth Sacheverell* had lately purchased to him and his heirs, together with the said manor or lordship; *to have and to hold* the manor and tenements aforesaid with the appurtenances (except as before excepted), unto the said *Thomas Froggatt*, his executors, administrators, and assigns, from the 25th day of *March* then last past before the date of the said indenture for, during and unto, the full end and term of 21 years from thence next following, and fully to be compleat and ended; yielding and paying therefore yearly and every year *for and during the said term*, the yearly rent or sum of 119l. of good and lawful money of *England*, at two feasts or days, to wit, the feast of *Pentecost*, commonly called *Whitsuntide*, and *St. Martin* the bishop in winter, commonly called *Martinmas*, by even and equal portions, over and above all levies, taxes and deductions whatsoever; the first payment thereof to begin at the feast of *Pentecost* then next following; all which said payments to be made at or in the then dwelling house of the said *Jacinth Sacheverell* situate in *Morley* aforesaid.

faid. And the faid *Thomas Froggatt* did by the faid indenture (among other things) for himſelf, his heirs, executors and administrators, covenant, promiſe and agree to and with the faid *Jacinth Sacheverell*, his executors, administrators and aſſigns in manner and form following; that is to ſay, that he the faid *Thomas Froggatt*, his executors, administrators and aſſigns, or ſome of them ſhould and would yearly and every year during the continuance of the faid demife, pay or cauſe to be paid to the faid *Jacinth Sacheverell*, his executors, administrators and aſſigns, the faid rent by the faid indenture reſerved, at the times limited for the payment thereof, without any diſcount or deduction for levies as aforeſaid, as by the faid indenture (among other things) more fully and at large appears: by virtue of which faid demife, the faid *Thomas Froggatt* entered into the aforeſaid manor and tenements with the appurtenances (except as before excepted), and was poſſeſſed thereof and the faid *Thomas Froggatt* being ſo poſſeſſed thereof and the faid *Jacinth* being ſo ſeiſed of the reversion of the faid manor and tenements with the appurtenances in his demefne as of fee, the faid *Jacinth* afterwards, to wit, on the 9th day of *September* in the faid year of our Lord 1656, at the faid pariſh of *Stoake* in the faid county, made his laſt will and teſtament in writing, and by the faid laſt will and teſtament gave and deviſed the aforeſaid manor and tenements with the appurtenances to the faid *Thomas Sacheverell*, until any of the ſons of the faid *Thomas Sacheverell* begotten, or to be begotten, ſhould attain the age of 21 years; and afterwards, to wit, on the ſame day and year aforeſaid, the faid *Jacinth*, at the pariſh of *Stoake* aforeſaid, in the county aforeſaid, died in form aforeſaid ſeiſed of the reversion of the aforeſaid manor and tenements with the appurtenances. And the faid *Thomas Sacheverell* further ſays that he at the time of making the faid laſt will, and alſo at the time of the death of the faid *Jacinth*, at the faid pariſh of *Stoake*, in the faid county, had two ſons, to wit, *William Sacheverell* and *Ambroſe Sacheverell*, and that neither of the ſons of the faid *Thomas Sacheverell* has as yet attained the age of 21 years; after the death of which faid *Jacinth Sacheverell*, he the faid *Thomas Sacheverell* by virtue of the faid deviſe, was and yet is ſeiſed of the reversion of the

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Covenant by
leſſee for pay-
ment of the rent
during the conti-
nuance of the
demife.

D. ſer-
vant en-
tered and was
poſſeſſed.

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J. S. deviſed the
premiſes to the
plainiff,

and died.

faid

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1011l. 10s. rent
due to the plain-
tiff for 8 years
and a half.

faid manor and tenements with the faid appurtenances in form aforefaid demised unto the faid *Thomas Froggatt* in his demesne as of freehold for the term of his life; and being so seised thereof and the faid *Thomas Froggatt* being possessed of the faid manor and tenements with the appurtenances by virtue of the faid demise, the faid *Thomas Sacheverell* in fact says, that 1011l. 10s. of the rent for 8 years and the half of one year, ended on the feast of St. *Martin* the bishop in winter in the 21st year of the reign of our faid lord the now king, were and still are in arrear and unpaid to the faid *Thomas Sacheverell* after the death of the faid *Jacintb*, which faid 1011l. 10s. or any part thereof the faid *Thomas Froggatt* has not paid according to the form and effect of his faid covenant. And so the faid *Thomas Sacheverell* says, that the faid *Thomas Froggatt* has not kept with the faid *Thomas Sacheverell* the now plaintiff his faid covenant in form aforefaid made in this behalf with the faid *Jacintb*, his executors, administrators and assigns, but has altogether broken the same, and to keep the same with him has altogether refused and still refuses, to the damage of the faid *Thomas Sacheverell* of 1500l., and therefore he brings suit &c., with this that the faid *Thomas Sacheverell* will verify that the faid *William Sacheverell*, the eldest son of the faid *Thomas* is yet living and in full life, and within the age of 21 years, to wit, at the parish of *Stoake* in the faid county of *Derby*.

Imparlance.

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Defendant prays
oyer of the in-
denture.
The indenture
set out.

And now at this day, to wit, on *Wednesday* next after 15 days of *Easter* in this same term, until which day the faid *Thomas Froggatt* had leave to imparl to the faid bill, and then to answer &c. before our lord the king at *Westminster* comes as well the faid *Thomas Sacheverell* by his attorney aforefaid, as the faid *Thomas Froggatt* by *Philip Brace* his attorney; and the faid *Thomas Froggatt* defends the wrong and injury, when &c. and prays oyer of the faid indenture, and it is read to him in these words, to wit, "This indenture made the tenth day of *April* in the year of our Lord one thousand six hundred fifty-six, between *Jacintb Sacheverell* of *Morley* in the county of *Derby* esquire of the one part, and *Thomas Froggatt* of *Bubnell* in the county of *Derby*, lead-merchant, of the other part, witnesseth, that the faid *Jacintb Sacheverell*,
for

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for and in consideration of the rent hereafter in and by these presents reserved, and for divers other good causes him thereunto moving, hath demise, leased, set and to farm let, and doth hereby demise, lease, set and to farm let, unto the said *Thomas Froggatt* his executors, administrators and assigns, all that the manor or lordship of *Stoake* in the said county of *Derby* with the rights, members and appurtenances thereof, and all the lands, tenements and hereditaments thereto belonging, together with one smelting-mill; (excepting and always reserving out of this present demise, all the lands, tenements and hereditaments, ways, waters, commons, profits, commodities, and appurtenances whatsoever that now are in the possession of *Robert Ashton* of *Stony Middleton* in the said county gent. or which heretofore were in the possession of *Robert Ashton* deceased, late father of him the said *Robert Ashton* of *Stony Middleton*, and also excepting and reserving out of this present demise the chief rent, services and perquisites of courts of or belonging to the said manor or lordship,) and the said *Jacinth Sacheverell* for the consideration aforesaid doth demise, lease, set and to farm let unto the said *Thomas Froggatt*, his executors, administrators and assigns, all that parcel of land or ground called the *Tonddpool* with the appurtenances near adjoining to the said manor or lordship of *Stoake*, and which the said *Jacinth Sacheverell* lately purchased to him and his heirs, together with the said manor or lordship; to have and to hold the said manor or lordship of *Stoake* with the rights, members and appurtenances thereof, and all other the lands, tenements and hereditaments aforesaid with every of their appurtenances (except before excepted) unto the said *Thomas Froggatt*, his executors, administrators and assigns, from the 25th day of *March* now last past before the date hereof, for and during and until the full end and term of one and twenty years from thence next ensuing and fully to be compleat and ended; yielding and paying therefore yearly and every year, for and during the said term, unto the said *Jacinth Sacheverell*, his executors, administrators and assigns, the yearly rent or sum of 119l. of good and lawful money of *England*, at the feasts or days, to wit, the feasts of *Pentecost*, commonly called *Whit-Suntide*, and *St. Martin* the bishop in winter commonly called

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Martinmas, by even and equal portions, over and above all levies, taxes and deductions whatsoever, the first payment thereof to begin at the feast of *Pentecost* now next ensuing, all which payments to be made at or in the now dwelling house of the said *Jacynth Sacheverell* situate in *Morley* aforesaid. And the said *Thomas Froggatt* doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *Jacynth Sacheverell*, his executors, administrators and assigns in manner and form following; that is to say, that he the said *Thomas Froggatt*, his executors, administrators and assigns, or some of them, shall and will for the last seven years of the said term of one and twenty years hereby leased or granted, pay or cause to be paid unto the said *Jacynth Sacheverell*, his executors, administrators or assigns, the sum of forty shillings for every acre of the said lands, grounds or premises hereby leased, at the times and place aforesaid, that he or they shall plow or till, or cause to be plowed or tilled, over and above the rent hereby reserved for every year, and so rateably or proportionably for every greater or lesser quantity; and that he the said *Thomas Froggatt*, his executors, administrators and assigns, or some of them, shall from time to time and at all times during the continuance of this present demise, well and sufficiently repair, uphold, maintain and keep the said smelting-mill and manor-house, and all the other houses or buildings, hedges, walls and fences now standing or being in or upon the said premises hereby demised or any part thereof, and at the end of the said term shall leave and yield up the same unto the said *Jacynth Sacheverell*, his executors, administrators and assigns, or some of them, in good, sufficient and tenantable repair; and that he the said *Thomas Froggatt*, his executors, administrators and assigns, or some of them, shall and will yearly and every year, during the continuance of this present demise, pay or cause to be paid unto the said *Jacynth Sacheverell*, his executors, administrators and assigns, the said rent hereby reserved at the times limited for payment, without any discount or deduction for levies as aforesaid; and further that he the said *Thomas Froggatt*, his executors or administrators, shall not, or will not, at any time hereafter during the continuance of this present demise, sell, let or assign

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assign over this lease, or his or their term or interest therein, to any person or persons whatsoever, without the licence or consent of him the said *Jacintb Sacheverell*, his heirs, executors or administrators in writing under his or their hands and seals first had and obtained; and the said *Jacintb Sacheverell* doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and grant, to and with the said *Thomas Froggatt*, his executors, administrators and assigns, that he and they shall and may from time to time, and at all times hereafter during the continuance of this present demise, paying the rent, and performing the covenants herein contained, peaceably and quietly have, hold and enjoy the aforesaid premises with every of their appurtenances (except before excepted) without any lawful let, suit, trouble, eviction, interruption or disturbance whatsoever of him the said *Jacintb Sacheverell*, his heirs, executors, administrators or assigns, or of any other person or persons whatsoever now claiming or hereafter lawfully to claim by, from or under him, them, or any of them; provided nevertheless and it is the full agreement of both these parties hereunto, that if the said rent hereby reserved, or any part thereof, shall happen to be behind or unpaid by the space of forty days after any of the days or times whereupon the same is hereby limited to be paid, that then and from thence and at all times then after, it shall and may be lawful to and for the said *Jacintb Sacheverell*, his executors, administrators and assigns, and every or any of them, to re-enter into all or any of the premises hereby demised, and to hold the same again and every part thereof as formerly, any thing in these presents contained to the contrary thereof in anywise notwithstanding. In witness whereof the parties above said have to these present indentures interchangeably put their hands and seals, dated the day and year first above written." Which being read and heard, the said *Thomas Froggatt* prays judgment of the said declaration, because he says that the declaration aforesaid and the matter in the same contained are not sufficient in law for the said *Thomas Sacheverell* to have his said action maintained against the said *Thomas Froggatt*, to which he the said *Thomas Froggatt* has no necessity, nor is he bound by the law of the

Demurrer.

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land in any manner to answer; wherefore for want of a sufficient declaration in this behalf, the said *Thomas Froggatt* prays judgment of the said declaration, and that the said declaration may be (1) quashed &c.

Joinder in de-
murrer.

And the said *Thomas Sacheverell* says that, for any thing by the said *Thomas Froggatt* above in pleading alleged, the de-
claration

(1) It has already been observed, that the proper way of declaring upon a deed of demise, is to set out so much only of the deed as is necessary to intitle the plaintiff to recover, and no other covenants besides those on which breaches are assigned; and ever then not to set them out in *letters and words*, but merely their *substance and legal effect*. 1 Saund. 233. note (2). For even if the defendant should plead *non est factum*, the difference in the phrases and sentences between the deed stated in the above-mentioned manner in the declaration, and the deed itself when read in evidence, will be no variance. It is also holden that the plaintiff is not bound to shew more of the deed in his declaration, than what makes for him. However, if any part of the deed be omitted in the declaration, which the defendant conceives would, if shewn, induce the court to construe the deed in his favour in point of law, and decide against the plaintiff, the proper mode is for the defendant to prayoyer of the deed, and, after setting it out in *hæc verba*, to demur. By so doing, the defendant is enabled to compare one part of the deed with the other, and from the whole context to explain and shew the intention of the parties, or the legal effect of the deed. As in the principal case, the plaintiff

thought it best answered his purpose to state in his declaration a part only of the *reddendum*, namely, “*yielding and paying the yearly rent of 119l during the term,*” leaving out the words “*unto the said Jacinth Sacheverell, his executors, administrators and assigns;*” therefore the defendant, to shew how the *reddendum* was in the deed, very properly set it out onoyer. So also (among many other instances which may be given) in the case of *Browning v. Wright*, 2 Bos. & Pull. 13. where in covenant by vendee against vendor, who had covenanted that he had a good right to convey, the declaration stated an eviction of the plaintiff by a stranger, it appeared by the partial statement of the deed in the declaration, that the vendor had covenanted against the acts of strangers, and the court would have been of that opinion upon the face of the declaration, if the defendant had pleaded some collateral matter, and afterwards moved in arrest of judgment; but as from comparing the whole deed together it was clear that the vendor had only meant to covenant against the acts of *himself, and his heirs*, therefore to enable the court to construe the covenant according to such intention of the party, the defendant set forth the whole deed uponoyer, thereby making it a part of the declaration,

claration of the said *Thomas Sacheverell* ought not to be quashed, because he says that the said declaration and the matter in the same contained are good and sufficient in law for the said *Thomas Sacheverell* to have his said action thereof maintained against the said *Thomas Froggatt*, which said declaration and the matter in the same contained he the said *Thomas Sacheverell* is ready to verify and prove as the court &c. And because the said *Thomas Froggatt* does not answer the said declaration, nor has hitherto in anywise denied the same, he the said *Thomas Sacheverell* prays judgment and his damages on occasion of the said breach of covenant to be adjudged to him &c. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, therefore a day is given to the parties aforesaid before our said lord the king at *Westminster* until day next after to hear their judgment of and upon the premises, because the court of our said lord the king now here is thereof not yet advised &c.

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*Curia advisare
vult.*

Sacheverell versus Froggatt.

Case 59.

Pasch. 23 Car. 2. Regis. Rot. 590.

COVENANT for nonpayment of arrears of rent brought by *Sacheverell* plaintiff against *Froggatt* defendant. The case in effect was this: *Jacinth Sacheverell* was seised of the manor of *Stoake* with the appurtenances in the county of *Derby* in his demesne as of fee; and so seised by indenture

S. C. 2 Lev. 13.
Sir T. Raym.
213. 1 Vent.
148. 161.
2 Keb. 798.
819 833. 839.
One filed in
fee lets for years,
reserving rent

during the term to the lessor, his executors, administrators and assigns, and lessee covenants to pay it accordingly, and the lessor devises the reversion and dies; the reservation is good to continue the rent during the whole term, and the devisee shall have an action of covenant for the non-payment of it.

ration, and then demurred, and so took the opinion of the court on the construction of the covenant. Indeed if the deed is set out in the declaration so

much at length, that no further benefit can be derived from setting it out on oyer, then it is enough merely to demur to the declaration.

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demised it to the defendant to have for twenty-one years, *yielding and paying therefore yearly and every year, for and during the said term, unto the said lessor, his executors, administrators and assigns*, the rent of 119l. at *Whitsuntide* and *Martinmas* by equal portions; and the defendant covenanted with the lessor, his executors, administrators and assigns to pay or cause to be paid *yearly and every year, during the continuance of the said demise*, to the said lessor, his executors, administrators and assigns, the said yearly rent at the said times limited for payment thereof without any deduction &c.; by virtue of which lease the defendant entered, and afterwards during the said term the lessor devised the reversion to the plaintiff and died; and for rent arrear and unpaid after the death of the lessor, the plaintiff, as assignee of the reversion brought this action of covenant on the covenant aforesaid against the defendant, who, on oyer of the indenture of lease, demurred to the declaration; and the point was on the *reddendum*, whether the rent so reserved shall have a continuance after the lessor's death, it not being reserved to the lessor *and his heirs*, as the defendant objected it ought to be. And this case was opened and argued in *Trinity* term last past; and *Hale* chief-justice then said, if it was a new case, there would not be much question in it.

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And now this term it was argued again by *Winnington* for the defendant, and Sir *William Jones* for the plaintiff. And *Winnington* for the defendant said, that this rent was determined and extinct by the death of the lessor who reserved it, because it was not reserved to the lessor *and his heirs*; for he said the reservation was the act and words of the lessor, and his creature, and therefore shall be construed more strongly against the lessor himself as it is said in *Hill v. Grange*, Plow. 171. and shall not be enlarged beyond the words, as it is there also said. And he cited the book of 12 Edw. 3. Fitz. Affize 86. if a man seised in fee lease an acre of land reserving 10s. rent to him and his heirs, and also lease another acre reserving another 10s. rent *to himself*, without saying, and to his heirs, the heir shall not have the last rent, but it is extinct by the death of the lessor; and so is the opinion of *Moyle*

in

in 10 Edw. 4. 18 b. (2) So is Dyer, 45. a. Co. Lit. 47. a. (3) And because it was insisted on the other side, that the words *during the term* made the case different from the cases before cited, he said he would cite some cases in point where though the words *during the term* were put in, yet for want of the word *heirs* the rent was adjudged not to have a continuance after the death of the lessor who reserved it, but was gone and determined by his death; and for this he cited Cro. Elz. 217. *Richmond v. Butcher*, where the case was, that one *Colveil* being seised in fee made a lease of land for twenty-one years, rendering 20s. rent *during the term* to him his executors and assigns; and it was there adjudged that the heir, after the death of the lessor, should not have the rent because it was not reserved to the heir, which is a case adjudged in the very point with the case at bar. And so is the case of *Sury v. Brown* 2 Roll. Abt. 451. where it is ad-

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(2) But *Littleton* was of a contrary opinion, for he said that if "I let land to a man for a term of years, rendering to me a certain rent, without saying, and to my heirs, yet if I die within the term, my heir shall have the rent, for it is annexed to the reversion which is descended to my heir." And it was in answer to this that *Moyle* said, "In your case the heir shall not have the rent, for it is all one to say, rendering to me a certain rent, as to say rendering to me during my life, in which case the heir shall not have the rent." So that at best it is but the opinion of *Moyle* against that of *Littleton*, who has not only justice and equity, but also principles of law, namely, that rent is incident to the reversion, in support of his opinion. And *Jones* Justice seems to consider these opinions in this light, and observes there is a discordance in the books upon this subject; Latch. 100. *Sury v. Brown*. Sir Will. Jones, 308, *Bland v. Inman*, where all

the cases on both sides are collected; though the better opinion was that the rent was not payable to the heirs after the death of the lessor.

(3) In which books a difference is taken between reserving rent to the lessor, or to the lessor and his assigns, or to him and his executors, and reserving a rent generally, without saying to whom; in the former cases it is holden that the rent determines by the lessor's death, if he dies within the term, but in the latter case, the rent shall go along with the reversion to the heir or assignee. But *Willoughby* and *Jenney* justices said, it was a narrow difference: and *Jones* Justice adopted the same opinion in a subsequent case, and although he admitted the difference, yet he said it was to be observed, when the words *during the term*, were omitted in the *redendum*. Latch. 101. *Sury v. Brown*; and with him agrees, 27 H. 8. 19, a. per *Audley* Lord Chancellor.

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(c) Sir W. Jones,
302. S. C.

judged that the heir of the lessor, after his death, shall not have the rent reserved, because it was not reserved to the lessor and his heirs, but only to him his executors and assigns; and yet the words *during the term* were inserted in the reservation, which is directly full in point with the case at bar. And he also cited the case of *Bland v. Inman* Cro.

Car. 288 (c). where both the cases before cited are cited to be adjudged and also to be good law; and it is also adjudged there, that where husband, being possessed of a term, by indenture between him and his wife of the one part, and the assignee of the other part, but the wife had never sealed, assigned all the term to the assignee rendering rent to the husband and wife and to the survivor of them, the husband died and the wife survived, and she could not have the rent because no interest passed from her, and yet the administrator could not have it because it was reserved to the survivor who was the wife and not the administratrix. And so he said that all those books prove that the reservation shall not be enlarged beyond the express words of it; but the law would sooner adjudge the reservation void than enlarge it by construction. Wherefore he said that here the heir cannot have this rent after the death of the lessor, and consequently *the plaintiff who is the assignee cannot have it, and so he prayed judgment for the defendant.*

Sir William Jones *è contra*. And that here the plaintiff being the assignee is well entitled to this rent: and he took it for the foundation of his argument that here was a reservation *during the term*; and if there were no more words, it would have been clear that the rent should continue. And these words shew the intent of the parties that the rent should continue during the whole term, and then the other words which are added, namely, *to the lessor his executors and assigns*, shew nothing to abridge it; nor does it appear by them that the intent of the parties was that the rent should cease by the death of the lessor within the term. And he agreed to the books of 12 Edw. 3. Fitz. Affize 86. 10 Edw. 4. 18. b. Dy. 45. a. and Co. Litt. 47. a. for all those books speak generally of a reservation of the rent to the lessor his executors and assigns, or the lessor only, without saying *during the term*;

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term; so there does not appear any intention in the parties to continue the rent longer than for the life of the lessor; so without prejudice to the case at bar it may be granted that these books are good law. Then he said, if a man makes a lease for years rendering rent *during the term* generally, and does not say to whom the rent shall be paid, the law makes a construction that it shall be paid during the term to those who have the reversion, and to whom it shall from time to time belong, as may be seen in 21 H. 7. 25 b. 8 Rep. 71. a. (4). *Whitlock's case*. Now it is to be seen in this case, whether the addition of the words, *to the lessor his executors and assigns*, coming after a good reservation of the rent before, shall make the whole reservation vicious, which, without such addition, would of itself have been good. And it seemed to him that it would not, because it is an useless addition, and *utile per inutile non vitiatur*. And to prove it he cited Cro. Eliz. 832. *Pain v. Malory*. 5 Rep. 111. b. S. C. where an abbot made a lease rendering rent *during the term* to him or his successors, it was adjudged that the rent should have a continuance during the whole term, because it was reserved *during the term*; yet it was clear if a rent had been granted *to the abbot or his successors*, he would have had it only for his life, because it is in the disjunctive, whereas it should have been in the copulative, namely, to the abbot *and* his successors: but in the case of a reservation, the words *during the term* declare the intention of the parties, that the rent should have a continuance during the term, and then the law orders and disposes it how it shall go and to whom it shall be paid, notwithstanding the words coming after, namely, *to the abbot or his successors*. And as to the case of *Bland v. Inman*, Cro. Car. 288, he answered that the principal case may be good law, for where a man will reserve rent to a stranger the heir shall not have it, because

(4) In which it is said, that where a lease is made by tenant for life under a power, the most clear and sure way is to reserve the rent yearly during the

term, and leave the law to make the distribution, without the express reservation to any one.

expressio

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Where one re-
serves rent to a
stranger, neither
the heir nor
stranger shall
have it.

expressio unius est exclusio alterius; and so is Hob. 130. *Oates v. Frith*, where the father seised in fee, he and his son and heir apparent by indenture made a lease for years to begin on the death of the father, rendering rent to the son by his proper name; although the son was heir to the father, he could not have the rent as heir to his father because the rent was not reserved *to the heir*; and he could not have it by the reservation on the lease because he was a stranger to the land and had nothing in it at the time of making the (5) lease. And as to the case of *Richmond v. Butcher*, Cro. Eliz. 217. which was so strongly urged on the other side, he said the words *during the term* were not in the case, as he verily believed, although it be so reported in the book, because the same case is reported in 2 Roll. Abr. 450. where the words *during the term* are omitted; and then the case is no more than the cases above cited from 12 Edw. 3. Fitz. Affize 86. 10 Edw. 4. 18. b. Dy. 45. a. Co. Litt. 47. a. for if the words *during the term* and the word *heirs* were both omitted out of the reservation, the judgment there does not prejudice

(5) For *heir* is the only word of privacy in law requisite to the reservation of rents, and in conditions: the heir being, in representation in point of taking by inheritance, the same person with the ancestor. Hob 130. And, says Mr. Justice *Dodderidge*, it is an infallible and undeniable ground that rent cannot be reserved to a stranger. Latch. 276. *Cole v. Sury*. S. P. Co. Litt. 143. b. 213. b. & note (1). in *Hargrave* and *Butler's* edition. In *Frontin v. Small*, 1 Str. 705. it is said in argument that a lease may be good reserving rent to a stranger, who is no party to the deed. *Et per curiam*, no doubt but in a good lease the rent may be so reserved, In *Deering v. Farrington*, 1 Mod. 113. *Hale C. J.* says, that "If I make a lease for years,

reserving rent to a stranger, an *action of covenant* will lie by the party to pay the rent to the stranger.

It is true, if A. and B. join in a lease of land wherein A. has nothing, reserving the rent to A. by indenture, it is good by estoppel to A. But if tenant for life with several limitations over, make leases under a power, and reserve the rent to himself, and to every person to whom the inheritance or reversion of the premises shall appertain during the term, this is a good reservation, for the law will distribute the rent to every one to whom the limitations of the use are made; and in such case no rent is reserved to a stranger, for the reservation precedes the limitation of the uses to strangers. 8 Rep. 71. a. *Whitlock's case*.

the

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the case in question. But he said, if the words *during the term* were in that case, yet the court did not take any more notice of them than if they had been left out of the case, and nothing was moved upon them either at the bar or on the bench, and therefore he said the judgment was no authority in point against him, and the rather because the later resolutions were against the said case, though the words *during the term* were in the case, which for the reason aforesaid he much doubted. And to the other case of *Sury v. Browne*, 2 Roll. Abr. 451. he said it was the same with the case at bar, and therefore the judgment in that case would govern the case at bar. And true it is that *Rolle* has reported judgment to be given that by the reservation the rent did not continue after the death of the lessor; but he said, it is otherwise reported in Latch. 44. 99. 255. (b) 264. in the same case of *Sury v. Browne*, and in another case of *Sury v. Cole*, and that the reservation being *during the term* the rent should have continuance after the lessor's death, though the word heirs was omitted out of the reservation: and therefore he had caused the roll to be searched; and the roll of *Sury v. Browne* was produced in court, which was entered Hil. 20 Jac. regis, Roll. 177. and was read in court; and it thereby appeared, that it was an action of debt brought by the assignee of the reversion for rent arrear after the assignment without an averment of the life of the lessor (6); and the lessee the defendant pleaded an assignment over before the rent had accrued due, but he laid no *venue*, upon which it was demurred: and after several continuances judgment was entered for the plaintiff; and the other case of *Cole v. Sury* was entered Easter 22 Jac. regis, Roll. 62. and judgment is there given for the plaintiff also on the same case, that the reservation was good to continue the rent during the whole term, although it was not reserved to the heirs. Which judgments were subsequent judgments in point, and later than the judgment in *Richmond v. Butcher*, on which judgments he relied, and concluded and prayed judgment for the plaintiff.

(b) And so it is
in 3 Bulst. 323.

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(6) So that the lessor was to be taken to be dead, and then the question arose

whether the rent continued after his death during the term.

Hale

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Hale chief-justice said to *Coleman* at the bar, that it is mention in the end of *Richmond v. Butcher*, that a written book was shewn to the judges in 12 Edw. 2. on which they relied; and he said that there was a fair manuscript of all the years of Edward the Second in *Lincoln's-Inn* Library, and desired him to search it to see if he could find any such case in the said book of Edward the Second; for he thought it was a mistake, and that it was the book of 12 Edw. 3. which is not printed at large, but was the case abridged by *Fitzherbert* in the said title *Assize* 86. And afterwards *Coleman* informed the court that he had searched the said book of Edw. 2. but did not find any such case there.

And after deliberation judgment was given for the plaintiff in this case by the whole court, and that the reservation was good to continue the rent during the whole term, and that the plaintiff being assignee should have it. And *Hale* chief-justice said the case of *Paine v. Mallory* went far in this case: and he took notice that here in the covenant on which the plaintiff has brought his action the word heirs was, and though the defendant had not covenanted with the lessor and his heirs, yet he said it was good enough for the assignee to maintain the action, because the rent being transferred to the plaintiff as assignee, the law transferred the covenant also as incident to the rent, and therefore the action was well brought. And the plaintiff had judgment (7) as afore-said.

(7) In the report of this case in 1 Vent. 161. Lord *Hale* delivers the opinion of the court pretty much at length, and lays down some useful rules respecting the reservation of the rent. He said, that where the reservation of the rent is general, the law directs according to the intent and the nature of the thing demised. As if tenant in tail makes a lease for years, rendering rent to him and his heirs, the rent shall go to the heir in tail along with the rever-

sion: for the law uses all industry imaginable to conform the reservation to the estate. So where tenant for life, the remainder over to several by limitation of uses, with power to make leases, demises, rendering rent to him, his heirs and assigns, it shall be adjudged to him in remainder. 8 Rep. 70. b. *Whitlock's* case. So if lessee for 100 years make a lease for 50 years, rendering rent to him and his heirs during the term, it shall go to the executor. So where

said, and a writ of inquiry was awarded. And so the matter seems to be now settled. *Saunders* was counsel with the plaintiff, but he did not argue it.

SACH-
EVERELL v.
FROGGATT.

where a copyholder by licence leases, rendering rent to him and his wife during their lives, and to his heirs, where by the custom the wife has her free bench, the wife shall have the rent as incident to the reversion, though not party to the lease, for the reversion, if possible, will attract the rent to it.

So if tenant in tail to him and the heirs-male of the body of his father,

lets the land, rendering rent to him, *his heirs and assigns*, the rent shall go to the heir-male of the body of his father, though he be not heir to the lessor; for it is incident to the reversion.

Hard. 91. 95. *Cotter v. Merrick*. But a man may reserve a rent to himself for his life, and a different rent to his heir. Co. Litt. 213. b. 214. a.

Tate *versus* Lewen.

Case 60.

Pasch. 23 Car. 2. Regis.

LONDON, to wit. *Mary Tate* widow, administratrix of all and singular the goods and chattels, rights and credits which were of *John Tate* deceased, unadministered either by *Jane Tate* the wife of the said *John Tate*, or by *Patrick Tate* the brother of the said *John Tate* the husband of the said *Mary*, with the will of the said *John* annexed, complains of *John Lewen* being in the custody of the marshal of the marshalsea of our lord the king before the king himself, for that whereas the said *John Tate* in his life-time, to wit, on the 1st day of *September* in the year of our Lord 1665, at *London* aforesaid, to wit, in the parish of *St. Mary le Bow* in the ward of *Cheap*, at the special instance and request of the said *John Lewen*, had found and provided for the said *John Lewen* divers clothes and all materials thereunto belonging, and the said *John Lewen* being so indebted, in consideration thereof undertook and to the said *John Tate* in his life-time then and there faithfully promised, that he the said *John Lewen* would well and

Declaration on a
quantum meruit
by an admini-
stratrix de bonis
non &c. with the
will annexed.

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faith-

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(b) These words
seem to be omit-
ted in the origi-
nal by mistake.

21 count for
money paid.

Breach.

Administration
granted to the
plaintiff.

faithfully pay and satisfy the said *John Tate*, his executors or administrators, all such sums of money for the said clothes and materials so as aforesaid found by the said *John Tate* for the said *John Lewen*, “(b) as he therefore reasonably deserved to have of the said *John Lewen*,” when he should be thereunto afterwards requested. And the said *Mary* in fact says, that the said *John Tate* in his life-time, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, reasonably deserved to have of the said *John Lewen* for the said clothes and necessities 36l. of lawful money of *England*, and whereof the said *John Tate* in his life-time, to wit, on the 4th day of *September* in the year aforesaid, in the parish and ward aforesaid, gave notice to the said *John Lewen*. And whereas also the said *John Lewen* afterwards, to wit, on the same 4th day of *September* in the year aforesaid, at *London* aforesaid in the parish and ward aforesaid, was indebted to the said *John Tate* in his life-time in other 36l. of like lawful money of *England* for divers sums of money by the said *John Tate* in his life-time before then laid out and expended for the said *John Lewen*, and being so thereof indebted, he the said *John Lewen*, on the same day and year last mentioned, at *London* aforesaid in the parish and ward aforesaid, in consideration thereof undertook and then and there faithfully promised the said *John Tate*, that he the said *John Lewen* would well and faithfully pay and satisfy the said 36l. last-mentioned to the said *John Tate*, his executors or administrators, when he should be thereunto afterwards requested. Yet the said *John Lewen* not regarding his said several promises and undertakings, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *John Tate* in his life-time, and the said *Jane*, *Patrick*, and *Mary* after the death of the said *John Tate*, of the said several sums of money amounting in the whole to 72l., has not yet paid the said 72l. to the said *John Tate* in the life-time, and to the said *Jane*, *Patrick* and *Mary Tate* after the death of the said *John Tate*, (to which said *Mary Tate* administration of all and singular the goods and chattels, rights and credits which were of the said *John Tate*, not administered either by the said *Jane Tate* widow, or by the said *Patrick Tate*, brother of the said *John Tate*

Tate the husband of the said *Mary Tate*, with the will of the said *John Tate* annexed, by *Gilbert* by divine providence archbishop of *Canterbury*, primate of all *England* and metropolitan, on the 12th day of *September* in the year of our Lord 1668, at *London* aforesaid in the parish and ward aforesaid, was committed), nor has he hitherto in anywise satisfied them or either of them for the same, (although to do this he the said *John Lewen* afterwards, to wit, on the 10th day of *September* in the said year of our Lord 1665, at *London* aforesaid in the parish and ward aforesaid, was required by the said *John Tate* in his life-time, and although also afterwards, to wit, on the 1st day of *April* in the 23d year of the reign of our lord *Charles* the Second now king of *England* &c., at *London* aforesaid, in the parish and ward aforesaid, the said *John Lewen* was by the said *Mary Tate* after the death of the said *John Tate* thereunto required): Wherefore the said *Mary* says that she is injured, and has damage to the value of 100l., and therefore she brings suit &c. And the said *Mary* brings here into court the said letters of administration with the said will of the said *John Tate* annexed, which testify the granting of the administration to the said *Mary* in form aforesaid &c.

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LEWEN.

Protest of letters
of administration.

•Tate administratrix *versus* Lewen.

Cale 60.

Pasch. 23 Car. 2. Regis.

ASSUMPSIT. The plaintiff declares that the defendant, in consideration the intestate, (at the request of the defendant), had found and provided for the defendant *divers clothes and all materials thereunto belonging*, undertook to pay as much money as he reasonably deserved to have for the same, and avers that he reasonably deserved 36l. for the said clothes and *necessaries*; and lays also another *indebitatus assumpsit* for other 36l. for money expended, and that the defendant had not paid them to the intestate, or to the plaintiff, to the

S. C. 2 Keb 810.
A quantum meruit for diverse clothes and all materials thereunto belonging, found and provided for the defendant at his request, is certain enough without shewing the particulars, and the request implies that the defendant had notice of them.

damage

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damage &c. On a judgment by default a writ of enquiry was awarded, and damages were entirely assessed.

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And it was now moved in arrest of judgment by *Saunders*, that the declaration on the first promise was not good, because in a *quantum meruit* the plaintiff ought to shew the certainty of the things provided for which he demands a recompence; but here he has shewn no manner of certainty, for *non constat* whether the testator has provided two or three or more clothes, and therefore it cannot appear how much money he deserves for them; and here is no verdict to aid it. The plaintiff has also averred that the intestate deserved for the said clothes *and necessaries*, where no necessaries are mentioned before; and the damages being assessed entirely on both promises, the whole is bad, and the court cannot proceed to judgment.

Sed non allocatur: for it being said that the clothes were provided for the defendant at his request, it implies that he had notice of them; and here the value of the clothes is not to be recovered as in trover, where more certainty ought to be required, but only what the intestate deserves for them, of which the defendant may take notice as well as the plaintiff; and it is not necessary for the plaintiff to shew every one of the clothes particularly, or every point or ribband annexed to them, as was said by *Hale* chief-justice, but it is sufficiently certain as here. And the *necessaries* still be intended to be the materials before mentioned in the declaration, and no (1) others. And judgement was given for the plaintiff *nemine contradicente*.

(1) It has already been noticed that it was some time before an *indebitatus assumpsit*, or a *quantum meruit*, for work and labour generally, became a common form of declaring. Ante, 350. *Peters v. Opie*. The same observation applies to all those counts in a declaration which are called the common counts, as for goods sold and delivered, and the

like: there was a time when *assumpsit* for goods and merchandizes generally would have been wondered at; and Lord *Holt* used to say, he was a bold man who first ventured on them, though they are now every day's experience. 2 Str. 923. *Hayes v. Warren*. See Com. Dig. *Assumpsit* (H. 3).

Pinkney *versus* The Inhabitants of East Hundred Case 61.
in the County of Rutland.

RUTLANDSHIRE, to wit. The men inhabiting in the hundred of *East Hundred* in the said county were attached to answer as (1) well to our sovereign lord the king as to *Christopher Pinkney*, otherwise *Pinckney*, (b) of a plea, wherefore, whereas by a (2) statute made in the parliament of the lord *Edward the First* heretofore king of *England*, holden at *Winton* in the (c) 13th year of his reign, it is, among other things, ordained, That forasmuch as from day to day robberies, murders, and burnings were then more often used than they had been heretofore, and felons could not be attainted by the oath of jurors, who rather suffered strangers to be robbed and felons escape without punishment, than indict the offenders, of whom great part were people of the same county; or at least, if the offenders were of another country, the receivers of them were of places near where such felonies were committed; and this they did because an oath was not given unto jurors of the same county where such felonies were done;

Declaration on the statute of Winton, 13. Edw. I. of hue and cry.
(b) The words, "who sues as well for our said lord the king as for himself in this behalf," seem to be omitted in the original by mistake.
(c) 13 Edw. I. II. 2. c. 1, 2.

(1)* The reason, why the action is brought as well for the king as the party suing, seems to be, because the inhabitants of the hundred are guilty of a great contempt of the king, for which they may be fined, if they neglect or refuse to pursue the robbers; and it is an established rule that, in every case of a contempt to the king the action must be brought *as well to answer the king as the party*. Moor Rep. 64. Andr. 119. Besides which, the statute supposes that the negligence or refusal of the inhabitants to pursue the felons

proceeds from some of the inhabitants being either the receivers or abettors of the felons.

(2) It is not necessary to recite the statute: it is even dangerous to do so: because it renders the declaration subject to variances from misrecitals, which may be fatal to the action. 2 Vent. 215. *Anon.* And therefore the usual course of late years has been to omit the recital of the statute, and begin with "Whereas certain offenders" &c.

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and as to the restitution of damages no pain had before then been limited for their concealment and laches: 'The said king to destroy the power of felons had established a pain in that case, so that from thenceforth for fear of the pain more than for fear of any oath, they should not spare or conceal any felonies; and he commanded that proclamation should be solemnly made in all counties, hundreds, markets, fairs, and all other places where great resort of people was, so that none should excuse himself by ignorance, that from thenceforth every county might be so well kept that immediately upon such robberies and felonies committed, fresh suit should be made from town to town, and from country to country; and also, when need required, inquests should be made in towns by him who is lord of the town, and after in the hundred, and in the franchise, and in the county, and sometimes in two, three or four counties, in case when felonies should be committed in the marshes of shires, so that the offenders might be attainted. And if the country would not answer for the bodies of such manner of offenders, the pain should be such that every country, to wit, the people dwelling in the country should be answerable for the robberies done and the damages; so that the whole hundred where the robbery should be done, with the franchises which should be within the precinct of the same hundred, should be answerable for the robberies done; and if the robbery should be done in the division of two hundreds, both the hundreds and the franchises within the precinct of the said hundreds should be answerable therefore. And after the robbery and felony done, the country should have no longer space than 40 (2) days, within which it should

behave

(3) The only mode of proceeding against the hundred on this statute is by original writ; but it must not be brought until 40 days are elapsed after the robbery, being the time allowed, as it above appears, by the statute to the inhabitants of the hundred to take the robber. 3 Lev. 320. *Pierfon v. Hundred of Westward*; for if he be taken within

that time, the hundred is not liable; or where the robbery is committed by several, if any one of the robbers is taken within that period, the hundred is discharged by virtue of the statute 27 Eliz. c. 13. though by the above-mentioned statute of *Winton* the hundred was chargeable, unless they were all taken. 7 Rep. 7. a. 1 Sid. 11. *Baskerville*

behave them to agree for the robberies or offences, or else they should answer for the bodies of the offenders, as in the said statute more fully appears. And whereas certain offenders to the said *Christopher* unknown, in the king's highway at the parish of *Tickencoate*, within the said hundred of *East Hundred* in the aforesaid county of *Rutland*, with force and arms

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ville v. Hundred of Agbridge. Therefore the original must not be tested until 40 days after the robbery, otherwise it is erroneous. 2 Leon. 12. In which last case indeed it is held, that the statute of *Winton* gives *half a year* to the inhabitants of the hundred to take the robber; and Lord *Coke* says that this statute expressly gives half a year, and not 40 days as mentioned in the edition of the statutes then lately published, but the 40 days are given by the statute 28 Edw. 3. c. 11. ; but in the above cited case in 3 Lev. 320. the court ordered the parliament-roll to be searched, and it appeared that the statute of *Winton* itself gives only 40 days to the country, and the 28 Edw. 3. c. 11. is but a confirmation of it ; and it was accordingly so adjudged, where the plaintiff, in an action on the statute of *Winton*, declared that he was robbed, and none of the robbers taken *within 40 days* according to the statute ; and with this the precedents agree. Rast. 406. Co. Ent. 351. Hearne, 214. Thes. Brev. 141. Rob. Ent. 328. 331. 2 Saund. 375. 376. And now by statute 8 Geo. 2. c. 16. s. 3. no hundred shall be chargeable, if one or more of the felons be apprehended within the space of forty days next after public notice of the robbery given in the *London* gazette;

so that now it is prudent not to sue out the writ until the expiration of 40 days after such notice ; but the defendants must plead that circumstance, as well as that one of the offenders was taken by virtue of the 27 Eliz. and cannot give evidence of it on the general issue. Bull. Nis Pri. 187. ; but it is not error, as it is where the writ is sued out before the expiration of 40 days. So by the statute 27 Eliz. c. 13. s. 9. the action must be brought within a year after the robbery, the words of the statute being, " That no person hereafter robbed " shall take any benefit to charge any " hundred, except he or they so robbed " shall commence his or their suit or " action, within one year next after " such robbery " Upon which statute it has been adjudged that the day when the robbery was committed is to be *included* in the year ; as if a robbery be committed on the 9th of *October*, the action must at the latest be brought on the 8th of *October* following, for if it be not commenced until the 9th, it is then too late. Hob. 139. *Norris v. Hundred of Gawtry*. S.C. 2 Roll Abr. 520. (A.) pl. 8. Moor. 878. 1 Brownl. 156. S. C. cited Doug. 465 3d edit. : for which reason the plaintiff must produce a copy of the original to shew the action commenced within time. But if

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arms made an assault on the said *Christopher*, and 29l. 10s. in monies numbered of the proper monies of the said *Christopher* then there found, and divers goods and chattels being in the custody of the said *Christopher* to the value of 39l. 19s. 9d. then and there likewise found, from the said *Christopher* feloniously did take, rob, and carry away against the peace of our said lord the now king. And the said *Christopher* immediately

if any of the robbers are taken *before the action is commenced*, though it be half a year after the robbery, the hundred is not chargeable, the writ being "that they have not *hitherto* taken them." 1 Sid. 11. *Baskerville v. Hundred of Agbridge*. Co. Ent. 438, 439. The manner of proceeding by original writ against the hundred, is to prepare a *præcipe* and take it to the curitor of the county where the robbery was committed, who will accordingly make out the writ. The form of it is like other original writs in case, thus; "George the 3d, &c. to the sheriffs of S. greeting: If A. B. shall make you secure of prosecuting his complaint, then put by sureties and safe pledges the men inhabiting in the hundred of M. in your county, that they be before our justices at *Westminster* on the morrow of *All Souls* (or any other return-day) if in C. B., or before us on the morrow of *All Souls* wheresoever we shall then be in *England*, if in K. B.; to answer as well to us as to the said W. W. who sues as well &c. Why whereas certain offenders &c." Thel. Brev. 141.

If a hundred be called by the name of the half hundred of A. or of the upper or lower B. hundred, but in truth is a distinct hundred of itself, the

action must be brought against the inhabitants of the half hundred of A, or of the upper or lower B. hundred, and not against the inhabitants of the hundred of A. or the hundred of B.; as where, in an action against the inhabitants of the half hundred of W. there was a verdict for the plaintiff, and it was moved in arrest of judgment that the action ought to have been against the *whole* hundred; but it was answered, that the half hundred was a hundred of itself, and the court held that the action should have been against the inhabitants of the hundred *called the half hundred of W.*; and they over-ruled the objection and held the action well brought. 1 Brownl. 156. *Constable v. Half Hundred of Waltham*. Hob. 246. S. C. If the half hundred of A. or the upper or lower B. hundred be in fact only part of the hundred of A. or B. and the action is brought against it as a separate hundred, the proper way to take advantage of this seems to be to plead in abatement that it is only part of the hundred of A. or B.; but if it is a *separate and distinct* hundred of itself, and the action is brought against the *whole* hundred of A. or the *whole* hundred of B. the defendants may take advantage of it at the trial, and nonsuit the plaintiff.

after

after the said felony and robbery committed, at *Tickencoate* within the said hundred of *East Hundred* in the said county of *Rutland*, to wit, at the parish aforesaid, made hue and cry of the robbery and felony aforesaid, and then and there gave notice to the inhabitants of the town (b) of *Tickencoate* aforesaid, within the said hundred of *East Hundred*, of the robbery and felony aforesaid, and, after the said robbery and felony committed, and within 20 days next before the day of suing out the original writ of the said *Christopher*, the said *Christopher* before *Samuel Browne* esq. then one of the justices of our said lord the now king assigned to keep the peace in the said county of *Rutland*, dwelling near to the said hundred of *East Hundred*, to wit, at *Sticking* in the said county of *Rutland*, was examined upon his corporal oath, according to the form of the statute in such case made and provided “at
 “ *Westminster* (4) in the county of *Middlesex*, in the 27th year
 “ of the reign of the lady *Elizabeth* heretofore queen of Eng-
 “ land.” And the said *Christopher* upon his oath aforesaid then said that he did not (5) know either of the parties who
 com-

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(b) See Cro. Car. 379. that notice to the inhabitants of the vill near the place of the robbery, although such vill be out of the hundred, is good.

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(4) The words in italics are now omitted.

(5) The statute of *Winton* is confirmed and re-enacted in the same words, as far as regards the enacting clause, by the statute 28 Edw. 3. c. 11. And the statute 27 Eliz. c. 13. s. 11. enacts, “ That no person that shall be robbed
 “ shall have or maintain any action, or
 “ take any benefit, by virtue of the
 “ said two mentioned statutes, or either
 “ of them (13 Edw. 1. and 28 Edw. 3.)
 “ except he shall, with as much conve-
 “ nient speed as may be, give notice
 “ and intelligence of the said felony or
 “ robbery so committed unto some of
 “ the inhabitants of some town, village,
 “ or hamlet, near unto the place where
 “ any such robbery shall be committed;
 “ nor shall bring, or have, any action

“ upon and by virtue of any of the sta-
 “ tutes aforesaid, except he shall first,
 “ within 20 days next before such ac-
 “ tion, be examined upon his corporal
 “ oath, to be taken before some one
 “ justice of the peace of the county
 “ where the robbery was committed,
 “ inhabiting within the said hundred
 “ where the robbery was committed,
 “ or near unto the same, whether he
 “ knows the parties that committed the
 “ said robbery or any of them; and if,
 “ upon such examination, it be con-
 “ fessed that he does know the parties
 “ that committed the said robbery, or
 “ any of them, that then he shall, before
 “ the said action be commenced, enter
 “ into sufficient bond by recognisance
 before

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committed the robbery aforesaid, and after the robbery aforesaid committed 40 days are now elapsed, nevertheless the said men inhabiting in the said hundred of *East Hundred* have not yet made any amends to the said *Christopher* of or for the aforesaid robbery, nor have apprehended the bodies of the aforesaid felons and offenders, nor the body of any one of them

“before the said justice before whom
“the said examination is had, effectually to prosecute the same persons
“so known to have committed the said
“robbery, by indictment or otherwise,
“according to the due course of the
“laws of this realm.” Though the declaration, since the making of this statute, always avers that the plaintiff gave notice to the inhabitants of the robbery, and that he made an oath before a justice of peace that he did not know the offenders; yet it is held not to be necessary to do so, because the declaration is founded on the statute of *Winton*, which requires no such things to be done, and the statute 27 Eliz. is only directory, and its directions need not be inserted in the declaration, 2 Salk. 614. *Dowly v. Hundred of Odium*. But if it is so stated, it is not necessary to say that the justice before whom the oath was taken was a justice at the time of its being taken. *Cris. Temp. Hardw. 409. Merrick v. Hundred of Offulston*. Andr. 115. S. C. And if the action be discontinued, and a new one commenced, there ought to be such oath within 20 days before the new action. 1 Sid. 139. *Newman v. Inhabitants of Stafford*. The party robbed, it seems, must make the oath; and therefore if the action be by the

master, where the servant was robbed, the servant must swear, and not the master, for if the declaration states that the master made the oath, judgment will be arrested. Cro. Eliz. 142. *Green's case*. 1 Leon. 323. S. C. Cro. Car. 38. *Reymond v. Hundred of Oking*. Ibid. 336. 2 Salk. 613. And if the master brings the action upon a robbery of two servants, both must take the oath. 3 Mod. 288. *Ashcomb v. Hundred of Elthorn*. 1 Show. 94. 241. *Aishcome v. Hundred of Spelholme*. So if the servant delivers part of the money to another who travels with him, and they are both robbed together and the master brings the action, both must take the oath, though one be a quaker and refuse the oath. 3 Mod. 288. But if the master brings an action upon the robbery of two servants, and one only swears, he shall recover for so much as was in his possession. *Carth. 145. Ashcomb v. Hundred of Elthorn*. S. C. 3 Mod. 298. 2 Salk. 613. But if the servant delivers part of the money to another, and they are robbed together, and afterwards the servant brings an action for the whole, which he may do, it is sufficient if the servant alone makes oath, for the whole was in his possession. Ibid. And if the master delivers part of the money to his servant, and they are robbed together,

them, nor has hitherto answered for the bodies of them, or the body of any one of them, but have permitted and suffered the aforesaid offenders and felons to escape in contempt of our said lord the now king, to the great damage of the said *Christopher*, and against the form of the said (6) statute. And whereupon the said *Christopher Pinkney*, otherwise *Pinckney*, who

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thier, and the master brings the action, it is sufficient if the master alone swears; for the money delivered to the servant remains in the possession of the master, if he be robbed in the presence of the master. Ibid. If the party takes the oath before a justice of the peace of the county where the robbery was committed, who at the time when the oath was taken was out of the county, it is sufficient, for it is a ministerial act. Sir W. Jones, 239. *Helier v. Hundred of Benbush*. Cro. Car. 211. S. C. The form of the oath may be seen in Thes. Brev. 141. The reason why an oath is enjoined by the statute appears to be, that the person robbed should enter into a recognisance to prosecute the robbers, if he knew them, or any of them, and that the hundred might be excused on the conviction of such persons, and also to prevent a robbery by fraud and collusion. 3 Mod. 288. However, though the person robbed knows the offenders, or any of them, he may nevertheless bring an action against the hundred, only he must first enter into a recognisance to prosecute the offenders. Noy. 150. And by statute 8 Geo. 2. c. 16. s. 1. it is enacted, "That no person shall have or

" of the statute 13 Edw. 1. or 27 Eliz.
" or either of them, unless he shall.
" over and besides the notice already
" required by the last of the before
" mentioned statutes to be given of any
" robbery, with as convenient speed as
" may be after any robbery on him
" committed give notice thereof to one
" of the constables of the hundred, or
" to some constable, householder, head-
" borough, or tithing-man of some
" town, parish, village, hamlet or tith-
" ing, near unto the place wherein such
" robbery shall happen, or shall leave
" notice in writing of such robbery at
" the dwelling-house of such constable,
" householder, headborough, or tithing-
" man, describing in such notice to be
" given or left as aforesaid, so far as
" the nature and circumstances of the
" case will admit, the felon or felons,
" and the time and place of the rob-
" bery; and also shall within the space
" of 20 days next after the robbery
" committed, cause public notice to be
" given thereof in the *London* gazette,
" therein likewise describing, as far as
" the nature and circumstances of the
" case will admit, the felon or felons,
" and the time and place of such rob-
" bery, together with the goods and
" effects whereof he was robbed; and
" shall also, before any such action is

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Inhabitants in this behalf, by *Matthew Dodsworth* his attorney complains,
D. ROTEL. for that whereas certain offenders, that is to say, three men
 to the said *Christopher* unknown, on the 10th day of *October*,
 in the 22d year of the reign of our said lord the now king, in
 the king's (8) highway within the said hundred of *East*
Hundred

“ commenced, go before the chief clerk
 “ or secondary, or the filazer of the
 “ county wherein such robbery shall
 “ happen, or the clerk of the pleas of
 “ that court wherein such action is in-
 “ tended to be brought, or their re-
 “ spective deputies, or before the sheriff
 “ of the county wherein the robbery
 “ shall happen, and enter into a bond
 “ to the high constable of the hundred
 “ in which such robbery shall be com-
 “ mitted, in the penal sum of 100l. with
 “ two sufficient sureties, to be approved
 “ of by such chief clerk, secondary,
 “ filazer, or clerk of the pleas, or their
 “ respective deputies, or the sheriff of
 “ the said county, with condition for
 “ securing to such high constable the
 “ due payment of his or their costs
 “ after the same shall be taxed by the
 “ proper officer, in case he shall happen
 “ to be nonsuited, or shall discontinue
 “ his action, or in case any judgment
 “ shall be given against such plaintiff
 “ on demurrer, or that a verdict shall
 “ be given against him.” Since the
 passing of which act it is usual to insert
 in the writ and declaration the follow-
 ing averments next after stating that he
 did not know either of the persons who
 committed the robbery. “ And after
 “ the robbery aforesaid committed (to
 “ wit &c. add the day and year in the
 “ declaration) the said *Christopher* did,
 “ with as much convenient speed as
 “ might be, give notice thereof to B.
 “ E. then being one of the constables
 “ of the said hundred of *East Hundred*,
 “ in which same notice the said *Chris-
 “ topher* did describe, so far as the nature
 “ and circumstances of the case did
 “ admit, the aforesaid felons and the
 “ time and place of the aforesaid rob-
 “ bery, and the said *Christopher* after-
 “ wards and within the space of 20
 “ days next after the aforesaid robbery
 “ committed (to wit &c. add the day
 “ and year in the declaration) did
 “ cause public notice to be given there-
 “ of in the *London* gazette, therein
 “ likewise describing, so far as the na-
 “ ture and circumstances of the case
 “ did admit, the said felons and the
 “ time and place of the said robbery,
 “ together with the said goods and
 “ money of the said *Christopher*, where-
 “ of he was so robbed as aforesaid. And
 “ the said *Christopher* afterwards and
 “ before the day of suing out the ori-
 “ ginal writ in this behalf (to wit &c.
 “ add the day and place in the declara-
 “ tion) did go before *Thomas Bolton*
 “ esq. then being the filazer of the
 “ county of R. wherein the said rob-
 “ bery did happen, and entered into a
 “ bond to A. B. and C. D. then being
 “ high

Hundred, to wit, at the parish (9) of *Tickencoate* in the said county of *Rutland*, with force and arms, to wit, clubs, swords and knives, made an assault upon the said *Christopher*, and 29l. 10s. in monies numbered of the proper monies of the said *Christopher* then there found, and divers goods and chattels being in the custody of the said *Christopher*, of the value of 39l.

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“ high constables of the said hundred
“ of E. by the name of A. B. of E.
“ in the county aforesaid weaver, and
“ C. D. of L. in the county aforesaid
“ yeoman, high constables of the hun-
“ dred of E. in the county aforesaid,
“ in the penal sum of 100l. with two
“ sufficient sureties, (to wit, W. S. and
“ J. V. in the declaration) approved of
“ by the said *Thomas Bolton*, so then
“ being filazer as aforesaid, with a con-
“ dition to the said bond subscribed,
“ for securing, to the said A. B. and
“ C. D. the said high constables, the
“ due payment of their costs of the
“ action by the said *Christopher* against
“ the said hundred of E. by the suing
“ out of the original writ in this behalf
“ commenced, after the same costs shall
“ be taxed by the proper officer, in
“ case that the said *Christopher* shall
“ happen to be nonsuited in the same
“ action against the hundred of E. or
“ shall discontinue the same, or in case
“ that judgment shall be given against
“ him on demurrer, or that a verdict
“ shall be given against him therein,
“ according to the directions of the sta-
“ tute in such case made and provided,
“ and after the aforesaid robbery com-
“ mitted, and after the said public no-
“ tice in the *London* gazette as afore-
“ said, 40 days &c.” As the regula-
tions of this statute are also merely di-

rectory, and are properly matters of evidence, perhaps in strictness it may not be necessary to insert them in the writ and declaration; but as all the former precedents down to the passing of this act and subsequent to the 27 of Elizabeth, have the regulations of the 27 of Elizabeth inserted in them, and the uniform course since the 8 Geo. 2. has been to insert the regulations of that statute also in the writ and declaration, it is certainly the most adviseable and safe method to adhere to the usual form.

The words “ *with as much conveni-
“ ent speed as may be after the robbery,*” shall give notice to one of the constables, have received a liberal construction; as where the plaintiff was robbed soon after six in the morning at two miles and a half from *Northampton*, and the highwayman cut his bridle and stirrups, threw him into a ditch, and turned his horse loose; the plaintiff recovered them, remounted, rode through a village where he gave no notice, met three men on the road whom he informed of the robbery, and arrived at *Northampton* by seven o’clock, and gave notice to an innkeeper there, from whence he went to a place three miles off, where the high constable lived, and between eight and nine gave notice. This was held to be good notice; for the

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39l. 19s. 9d. then and there likewise found, from the said *Christopher* feloniously did take, rob, and carry away against the peace of our said lord the now king. And the said *Christopher* immediately after the said felony and robbery committed, within the said hundred of *East Hundred*, to wit, at the parish aforesaid, made hue (10) and cry of the aforesaid robbery

the high constable, was the properest person to go to, and it is not required he must go to the next constable. The plaintiff lost no time under all the circumstances, and the place where the constable lived, was not at such a distance but that it might come within the meaning of the word *near*. 2 Str. 1170. *Ball v. Hundred of Wymerley*. The notice in the gazette must contain every material description of the robber; as where a highwayman had red eyebrows, it was held that so distinguishing a mark should be described, otherwise it is fatal. 2 Will. 111. *Whitworth v. Hundred of Grimshoe*. The notice in the gazette should also contain a full and true description of the goods and effects of which the party was robbed, as far as they can possibly be ascertained; as if a man be robbed of bank notes, if he knows the dates and numbers, as well as the value of them; or if he can by inquiry and diligent search inform himself of their dates, numbers and value, he ought to insert them all in the notice in the gazette. This was admitted by the whole court in *Chandler v. Hundred of Sunning*. Barnes, 458. Bull. Nisi Prius, 186. But the court was in that case equally divided upon this question, namely, whether, if the party robbed neglects

to describe the whole that he has been robbed of, he can recover so much as he has well described; as for instance, in the last cited case the party knew the dates and numbers of some of the notes, and their value, but did not describe them in the notice. The better opinion seems to be that he cannot recover any part of it. 2 Will. 109. 113. *Whitworth v. Hundred of Grimshoe*. With respect to the bond to be given to the high constable, it is held sufficient to say that the bond was given to J. H. high constable, without averring that there was but one. Andr. 116.

It is enacted by statute 22 Geo. 2. c. 24. that no person shall recover against the hundred more than the value of 200l. unless the person or persons so robbed shall at the time of such robbery, be together in company, and be in number two at the least, to attest the truth of the robbery. And by statute 29 Car. 2. c. 7. s. 5. it is enacted that no hundred shall be answerable for a robbery upon any person who shall travel upon the Lord's-day. But this statute is confined to persons who are travelling; for where the plaintiff was robbed in going to church on a Sunday, he recovered. Com. Rep. 345. *Tasbmaker v. Hundred of Edmonton*. 1 Str. 406. S. C.

robbery and felony, and then and there gave notice to the inhabitants of the town of *Tickencoate* within the said hundred of *East Hundred*, to wit, at the parish aforesaid in the county aforesaid, of the said robbery and felony; and after the robbery and felony aforesaid committed, and within 20 days next before the day of suing out the original writ aforesaid

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(6) The declaration need not recite the original at large, but it is sufficient to say "attached to answer as well &c. "in a plea of trespass and contempt "against the form of the statute in "such case made and provided &c. "And whereupon the said A. B. who "sues &c." See 2 Wils. 105. *Whitworth v. Hundred of Grimsboe* the form of the declaration.

(7) Although this action is in form a *qui tam* action for the reason already mentioned, yet no part of the damages goes to the king, but he is only to have a fine; therefore the words "who as "well for our lord the king, as for "the plaintiff" need not be mentioned either in the joining of the issue, or the *venire facias*. Cro. Car. 336. Nor is it a penal action; and therefore it is within the statute of jeofails, and is also amendable, even after issue joined, like any other civil action. 3 Lev. 347. *Bearecroft v. Hundred of Burnham*. Andr. 115. *Merrick v. Hundred of Offelstone*. Cas. Temp. Hardw. 409. S. C. And the *venire* may be awarded *de corpore comitatûs* as in civil actions.

(8) It is said that the declaration must shew the robbery to be within the hundred, and in the highway; but that it is aided after verdict. 3 Mod. 258. *Yung v. Totnam*. S. C. 1 Show. 60.

Carth. 71. But none of the old precedents aver the robbery to be done upon the highway. Carth. 71. And if robbers assault a man on the highway in one hundred, and carry him to a coppice in another hundred and rob him there, the hundred where he is robbed is chargeable, though the robbery be committed out of a highway; and the court held that it is not necessary it should be a highway in which the robbery is done, to charge the hundred; 2 Ld. Raym. 826 *Cooper v. Hundred of Basingstoke*. 2 Salk. 614. S. C. 1 Mod. 221. S. P. per North chief justice; therefore perhaps it is as well not to state that the robbery was committed in the highway. But if one be robbed in a house, it is not within the statute, and the hundred is not chargeable; for a man's house is his castle, and he must defend it at his peril. 7 Rep. 6. a. So if a man be assaulted in the highway in the hundred of A., and be robbed in a house in the hundred of B., no action lies against the hundred of B. 2 Ld. Raym. 826. 2 Salk. 614. S. C. But it need not be averred in the declaration that the robbery was in the day time, though it must be proved. 1 Show. 60. Carth. 71. However, if there be sufficient light to discern and distinguish a man's countenance, though before

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faid, to wit, on the 3d day of *November* in the faid 22d year of the reign of our faid lord the now king, the faid *Christopher* before *Samuel Browne* esq. then one of the justices of our faid lord the king assigned to keep the peace in the faid county of *Rutland*, near the faid hundred of *East Hundred*, to wit, at *Stocking* in the faid county of *Rutland*, was examined upon his

before sun-rise, or after sun set, the hundred will be liable. 7 Rep. 6. a. *Ashpole's case*. Cro. Jac. 106. *May v. Hundred of Merley*.

(9) It is not necessary to prove the robbery to have been committed in the parish laid in the declaration; if it be proved in any other parish within the hundred it is sufficient. 2 Leon. 174. *Shrewsbury v. Hundred of Aylton*. Owen 7. *Bucknell's case*. And if the parish or place be not alleged to be within the hundred, it is aided after verdict. 3 Mod. 258. 1 Show. 60.

(10) Hue and cry need not be proved by the plaintiff, though alleged in the declaration, for it is the duty of the hundred to levy it. 7 Rep. 6. a. 1 And. 159.

(11) The declaration must be against the inhabitants of the hundred generally; for if it be against any by name, and all are not named, it is bad. 3 Keb. 126. *Steward v. Howey* But formerly the process might have been served on any inhabitant of the hundred; however now by the before-mentioned statute of 8 Geo. 2. c. 16. s. 4 it is enacted; "That no process for appearance in any action to be brought upon the said statutes 13 Edw. 1. and 27 Eliz. or either of them, shall be served on any inhabitant thereof, save only upon

"the high constable, or high constables
"of the hundred wherein the robbery
"shall happen, who is and are hereby
"required to cause public notice thereof to be given in one of the principal
"market towns within such hundred
"on the next market day, after he or
"they shall be served with such process; or if there shall happen to be
"no market town within such hundred,
"then in some parish church within the
"hundred, immediately after divine
"service, on the *Sunday* next after his
"or their being served with such process; and he or they is and are also
"hereby empowered and required to
"enter an appearance in the said action, and also defend the same for
"and on behalf of the inhabitants of
"the said hundred, as he or they shall
"be advised." The defendants must enter an appearance with the filazer on the *quarto die post* after the return of the original. With respect to the judgment and execution against the hundred, see post. 423. *Leigh v. Chapman*, note (1).

If several are robbed, they cannot join in an action against the hundred, unless they are joint-owners of the goods or money stolen. Dy. 370. a. To this action the defendants may plead not guilty. Vid. Ent. 211. Lill. Ent.

his corporal oath according to the form of the statute in such case made and provided at *Westminster in the county of Middlesex*. (a) in the said 27th year of the reign of the said lady Elizabeth late queen of England. And the said Christopher on his said corporal oath then said that he did not know either of the persons who committed the robbery aforesaid, and 40 days are now past since the said robbery: nevertheless the said men (11) inhabiting in the said hundred of *East Hundred* have not yet made any amends to the said Christopher of and for the said robbery, nor have apprehended the bodies of the aforesaid felons, nor the body of any one of them, nor have hitherto answered for the bodies of them, or the body of either of them, but have permitted the said offenders and felons to escape in contempt of our said lord the now king, to the great damage of the said Christopher, and against the form of the said statute (12) made and provided in the said 13th year of the reign of the said

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(a) Ante 376.
n. (4)

296. Hanf. Ent. 4. 1 Andr. 153. Or they may plead that they took one of the robbers on fresh suit; 1 Vent. 118. *Methin v. Hundred of Thilleworth*; and it is a sufficient taking if the robber be charged with the robbery in the presence of a justice of peace, although no one lays his hand upon him. Ibid. Or if he be found in gaol for another offence, and is indicted for that robbery; though a taking upon suspicion, if he be acquitted, is not sufficient. Dy. 370. a. in the margin. But there must be a taking, for it is no plea for the hundred to say, that they made fresh suit, if they do not add that they took some of the offenders. Dy. 370. a. In an action against the hundred of *Gravesend* for a robbery on *Gad's bill*, it seemed hard, says the book, to the inhabitants that they should answer for robberies committed on *Gad's bill*, because they are there so frequent, that

if the inhabitants should answer for all of them, they would be utterly undone. And *Harris* serjeant was of counsel for the hundred, and pleaded "that time out of mind &c. felons had used to rob on *Gad's bill*, and so prescribed to be discharged;" but the plea was discharged, and the inhabitants adjudged to be chargeable. 2 Leon. 12.

The party robbed may be a witness of necessity. 2 Roll. Abr. 686; and by the said statute 8 Geo. 2. c. 13. s. 15. an hundred or may likewise be a witness for the hundred. If the master bring an action on the robbery of his servant, he may be a witness to prove the delivery of the money or effects to him. 2 Roll. Abr. 686.; but this was against the opinion of *Rolle C. J.* and it seems necessary to confirm the master's testimony by other evidence.

(12) The words in italics are now omitted; for "*the statute*" necessarily means

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said Edward the first heretofore king of England; wherefore he says that he is injured and has damage to the value of 100l. And therefore he brings suit &c.

And the said men inhabiting in the hundred of *East Hundred* by *John Lugg* their attorney, come and defend the wrong and injury when &c., and pray judgment of the said

means the statute in *Winton*, 13 Edw. 1. the action being founded upon it only; and therefore, to conclude against the form of the statutes would be bad. The statutes of 27 Eliz. and 8 Geo. 2. are in restraint of the action, obliging the party robbed to do certain things, which are not required by the statute of *Winton*, before he can maintain the action; so that the statutes of 27 Eliz. and 8 Geo. 2. are in ease of the hundred and not in favour of the person robbed. Yelv. 116. *Andrew v. Hundred of Iwerkner*. Cro. Jac. 187. S. C. Andr. 115. *Merrick v. Hundred of Offlione*. Cal. Temp. Hardw. 409. S. C. The statute of *Winton* is a remedial law, and to be construed liberally. Andr. 118. Cowp. 487 *Ratcliffe v. Eden*. It is of great public advantage that the inhabitants of a hundred should be diligent and active in the pursuit of robbers; and the true reason why a hundred is chargeable, is, because the inhabitants have not taken the robbers within a certain time, and not because they did not prevent the robbery. 7 Mod. 157. *Cooper v. Hundred of Basingstoke*

This leads me to take notice of two other statutes, which make the hundred liable to the action of the party damaged by certain offences therein enumerated, in order to recover a recompence

for the damage which he has sustained; namely, the 1 Geo. 1. st. 2, c. 5. commonly called the riot act, and the 9 Geo. 1. c. 22. commonly called the black act. By the first-mentioned statute, sect. 4. it is enacted, "That if any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any church or chapel, or any building for religious worship certified and registered according to the statute 1 W. and M. sess. 1. c. 18. or any dwelling-house, barn, stable, or other out-house, that then every such demolishing, or pulling down, or beginning to demolish or pull down, shall be adjudged felony without benefit of clergy." And by the sixth section of the same statute it is enacted, "That if any such church or chapel, or any such building for religious worship, or any such dwelling-house, barn, or other out-house, shall be demolished or pulled down wholly, or in part, by any persons so unlawfully, riotously and tumultuously assembled, that then, in case such church, chapel, building for religious worship, dwelling-house, barn, stable, or out-house, shall be out of any

saïd declaration of the saïd *Christopher* because they say that the declaration aforesaid of the saïd *Christopher*, and the matter in the same contained, are not sufficient in law for the saïd *Christopher* to have his saïd action thereof maintained against the saïd men inhabiting in the hundred aforesaid; to which saïd declaration they the saïd men inhabiting in the hundred aforesaid have no necessity, nor are bound by the law of the land in anywise to answer; and this they are ready to verify; wherefore for want of a sufficient declaration in this behalf the saïd men inhabiting in the saïd hundred pray judgment (b) of the saïd declaration, and that the same may be quashed &c.

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(b) It is held that a plea which begins with praying judgment of the declaration, and concludes, "that the declaration may be quashed," is a plea in bar. 2 Ld. Raym. 1461. Watts v. Goodman. 5 Mod. 131. Leaves v. Bernard.

Willes Rep. 479. Bullethorpe v. Turner.
And

"any city or town, that is either a
"county of itself or is not within any
"hundred, that then the inhabitants
"of the hundred in which such damage
"shall be done, shall be liable to yield
"damages to the person or persons
"injured and damnified by such demo-
"lishing or pulling down wholly or in
"part; and such damages shall and
"may be recovered by action to be
"brought in any of his majesty's courts
"of record at *Westminster*, by the per-
"son or persons damnified thereby,
"against any two or more of the inha-
"bitants of such hundred, such action
"for damages to any church or chapel
"to be brought in the name of the rec-
"tor, vicar or curate of such church
"or chapel that shall be so damnified,
"in trust for applying the damages to
"be recovered in rebuilding and repair-
"ing such church or chapel; and that
"judgment being given for the plain-
"tiff in such action, the damages so to
"be recovered shall be raised and levied

"on the inhabitants of such hundred
"and paid to such plaintiff in such
"manner and form and by such ways
"and means, as are provided by the
"statute 27 Eliz. for reimbursing the
"person or persons on whom any
"money recovered against any hundred
"by any party robbed, shall be levied:
"and in case any such church, chapel,
"building for religious worship, dwell-
"ing-house, barn, stable, or out-house
"so damnified, shall be in any city or
"town, that is either a county of itself
"or is not within any hundred, then
"the action is to be brought against
"two or more inhabitants of such city
"or town." As the action is to be
brought *against any two of the inhabitants*
of the hundred, it does not seem neces-
sary to sue out an original writ against
them as in an action on the statute of
13 Edw. 1., but the plaintiff may pro-
ceed against them by bill in the K. B.,
or a common *capias* in the C. B., as
he may do against any other individuals.

This

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Joiner in de-
muror.

And the said *Christopher* says that, by any thing by the said men dwelling in the hundred aforesaid above alleged, the said declaration of the said *Christopher* ought not to be quashed, because he says that the declaration aforesaid, and the matter in the same contained, are good and sufficient in law for the said *Christopher* to have his said action thereof maintained against the men inhabiting in the said hundred, which said declaration and the matter in the same contained the said *Christopher* is ready to verify and prove as the court &c., and because the said men dwelling in the said hundred do not
answer

This statute, so far as it respects the action against the hundred by the party injured, is also held to be a remedial law, and ought to receive a liberal construction; and therefore although the words of the statute are, "*any dwelling-house, barn, stable, or other out-house,*" if the persons riotously assembled demolish and pull down a dwelling-house, and at the same time destroy the goods and furniture in the house, although such goods and furniture were not destroyed by means of the pulling down of the house, the hundred is liable to yield damages for the destruction of the furniture as well as of the house; for the destruction of the furniture and the demolition of the dwelling-house is one and the same act committed at one and the same time. Indeed if the destruction of the furniture be a separate act, it is not a felony, and the hundred is not liable: but where it is part of the same transaction, the hundred is chargeable to yield damages for the destruction of both house and furniture. At the common law antecedent to this statute, to demolish a house and furniture was a mere civil trespass, for which the

owner might bring an action of trespass against the wrong-doers, and recover damages against them for the whole loss he sustained, as well by the destruction of the furniture, as of the house; but this statute has turned the trespass into a felony; and it being merged in the felony, the party injured was of course deprived of his civil remedy against the trespassers, and therefore the statute has substituted the action against the hundred in lieu of it, and put the party injured in the same state as he was before. Cowp. 485. *Ratcliffe v. Eden*. Doug. 699. *Hyde v. Cogan*, and *Wilmot v. Horton* there cited. To support this action it is not necessary to prove that twelve rioters were assembled at the time of the demolition of a dwelling-house &c., for though in the first and third sections of the act the number twelve is particularly mentioned as descriptive of the offence thereby created, yet it is omitted in the fourth section which makes it felony riotously to demolish any dwelling-house &c., and also in the sixth section which gives the remedy against the hundred; which latter section being also a remedial law, makes the consideration

answer the said declaration, nor have hitherto in anywise denied the same, the said *Christopher* prays judgment and his damages on occasion of the said premises to be adjudged to him &c. But because the court of our said lord the now king here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid before
our

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*Curia advisare
vult.*

deration of the numbers assembled less important. 5 Term Rep. 14. *Pritchett v. Wa'dron*. The action may be brought by a trustee in whom the legal estate is vested for existing purposes; and most probably even by a bare trustee of a satisfied term. Ibid.

The demolishing and pulling down of a dwelling house &c., or a part of it, must amount to a felony within this act, in order to make the hundred liable to an action at the suit of the party injured for the damage done to his house. Therefore where a large mob collected in a town, where there was a general illumination, broke the windows of the plaintiff's house with stones &c., and also the stanchions of the windows, the uprights of the sashes, and also the window shutters on the inside; it was held that the hundred was not liable to an action for this damage done to the house, because it was not a beginning to demolish or pull it down within the meaning of the fourth section of the act; and the action is not maintainable against the hundred, unless the rioters are guilty of *felony*. 7 Term Rep. 496. *Reid v. Clarke*.

But where upwards of an hundred persons assembled together came to the plaintiff's house, who was a baker, and asked if he had any flour, and being an-

swered in the affirmative, they said they would have it at 2s. a stone, it being then worth about 5s; the plaintiff said he could not afford it at that price; but they insisted on having it, and he not able to resist began to measure it out in small quantities: The rioters then began to break the windows of the bake-house, and the dwelling-house adjoining thereto, and broke the glass of three windows and also the shutters; besides which they broke open a ware-house belonging to the plaintiff situate lower down in the same street on the opposite side of the way, in which there was flour. There however they only burst open the lock, and threw about three bags of flour worth 15l. into the street, from whence it was carried away by some of the mob. They took about ten stone out of the bake-house, which was sold at the price named by themselves. They also took away some malt and other things. The learned judge told the jury, that there was no doubt of the unlawfulness of the assembly; and as to their beginning to demolish or pull down the dwelling-house, that the glasses of the windows and the shutters, if fixed, were part of the dwelling house; nevertheless if they were satisfied that the mob meant to stop there and proceed no further, it might

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our said lord the king until the morrow of the holy *Trinity* wheresoever &c., to hear their judgment of and upon the premises, because the court of our said lord the king here is thereof not yet advised &c. At which day before our said lord the king at *Westminster* come the parties aforesaid by their attornies aforesaid, and because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises, a further day is given to the parties aforesaid before
our

be too much to say that it was a beginning to demolish &c. within the statute; but if they thought that the mob came *with an intention* to proceed to further acts of demolition, if they could not otherwise effect their purpose, then it was a beginning to demolish &c. within the act; whereupon the jury found for the plaintiff to the amount of all the damage proved. On a motion for a new trial the court of K. B. held that the damage done to the warehouse on the opposite side of the street was an entire distinct act, not consequential to bursting open the lock; and it would be carrying the construction of the statute too far to say that a bursting open of a lock upon such an occasion was a beginning to demolish the house; in the case of *Wilmot v. Horton*, cited in Doug. 701. note (3) *Hide v. Cogan*, the damage to the garden was immediately consequential to pulling down part of the house, and happened in the act of pulling it down. With respect to the dwelling-house and bake-house adjoining, the case was properly left to the jury to consider *quo animo*, the windows and shutters were broken; but that the flour taken out of the bake-house, which was compelled by the mob to be

fold, was not a damage which could be recovered by the plaintiff against the hundred. Upon which the plaintiff consented to take his verdict only for the damages done to the house by breaking the windows. 1 East. Rep. 615. *Burrows v. Wright*.

So where a mob consisting of more than two hundred persons came in the morning to the plaintiff's house at S. who was a flour seller and grocer; and after beating him, and threatening to break the windows and pull the house down, they actually broke the windows of the house and kitchen, cut the iron and stanchions, and broke the window shutters. They also pulled down a lean-to, or little outhouse, and tore off the roof of it. The latter was so placed, that when pulled down there was left an opening outwards from the upper chamber of the house, which had communicated as a door-way into the upper part of the lean-to. Out of the lumber-room with which this was connected the mob took a quantity of flour; some of it they sold one amongst another against the plaintiff's consent at their own price, (nearly half the value) which they paid to the plaintiff, some was stolen; and some was thrown about and wasted;
in

our said lord the king until three weeks of St. *Michael* where-
foever &c. to hear their judgment of and upon the premises,
because the court of our said lord the king here is thereof not
yet advised &c. At which day before our said lord the king
at *Westminster* come the parties aforesaid by their attornies
aforesaid; and hereupon the said *Christopher Pinckney*, other-
wise *Pinkney*, freely here in court remits all such damages as
might be adjudged to him by reason of the taking, robbing
and

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Plaintiff remits
the damages for
taking the goods.

in all more than two hundred stone. It
was objected that the plaintiff was not
entitled to recover for any part of the
flour which was taken and sold by the
mob, but only for the damage done to
the house and lean-to, and the flour
spoiled in so doing. The jury however,
under the judge's direction, found a
verdict for the plaintiff for the several
amount of the damages sustained by him
in each respect. But the court of K.B.
were of opinion that the hundred was
only liable for the damage done to the
house and lean-to, and for such of the
flour as was spoiled or destroyed in do-
ing that damage: but that as to the
flour stolen, or, which in effect was the
same thing, taken away and sold with-
out the consent of the plaintiff, that be-
ing a distinct felony in the offenders, an
offence which existed before the passing
of the riot act, and not an injury done
to the party by beginning to demolish
or pull down the house, it was not
within the fourth clause of the act, and
consequently not within the clause
giving damages against the hundred.
1 East. Rep. 636. *Greasley v. Higgin-*
bottom.

The plaintiff is intitled to his costs in
this action as well as in action against

the hundred on the statute of hue and
cry. 2 Wals 91. *Wilham v. Hill*.
Cowp. 485. *Ratcliffe v. Eden*. As to
the time within which the action is to be
brought, there is no case wherein this
point has been decided; but it should
seem that the eighth section of the act,
which limits criminal prosecutions for
the felony created by it to be com-
menced within twelve months after the
offence committed, would be held to
extend also to actions brought upon it.

And by the said statute 9 Geo. I. c.
22. sect. 1. it is enacted, "That if any
" person or persons shall unlawfully and
" maliciously kill, maim or wound any
" cattle, or cut down or otherwise de-
" stroy any trees planted in any avenue,
" or growing in any garden, orchard
" or plantation, for ornament, shelter
" or profit, or shall set fire to any house,
" barn, or out-house, or to any hovel,
" cock, mow, or stack of corn, straw,
" hay or wood, every person so offend-
" ing shall be adjudged guilty of felony
" without benefit of clergy." And by
the seventh section of the same act it is
enacted, "That the inhabitants of
" every hundred shall make full satis-
" faction and amends to all and every
" the person and persons, their execu-
" tors

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DE ROTEL.

Judgment for
the plaintiff.

and carrying away of any goods or chattels in the said declaration above mentioned, and prays judgment and his damages on occasion of the other premises to be adjudged to him &c. And thereupon the premises being seen and by the court here fully understood, it is considered that the said *Christopher Pinckney*, otherwise *Pinkney*, ought to recover his damages against

“tors and administrators, for the damages they shall have sustained, or suffered by the killing or maiming of any cattle, cutting down, or destroying any trees, or setting fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay or wood, which shall be committed or done by any offender or offenders against this act; and that every person and persons who shall sustain damages by any of the offences last mentioned, shall be and are hereby enabled to sue for and recover such his or their damages, the sum to be recovered not exceeding the sum of 200l. against the inhabitants of the said hundred, who by this act shall be made liable to answer all or any part thereof; and that if such person or persons shall recover in such action, and sue execution against any of such inhabitants, all other the inhabitants of the hundred who by this act shall be made liable to all or any part of the said damage, shall be rateably and proportionably taxed for and towards an equal contribution for the relief of such inhabitant against whom such execution shall be had and levied, which tax shall be made, levied and raised by such ways and means, and in such manner and form as is prescribed by the 27 Eliz.”

And by section 8. “Provided nevertheless that no person or persons shall be enabled to recover any damages by virtue of this act, unless he or they by themselves or their servants, within two days after such damage or injury done him or them by any such offender or offenders as aforesaid, shall give notice of such offence done and committed unto some of the inhabitants of *some town, village or hamlet* near unto the place where any such fact shall be committed, and shall within four days after such notice give in his, her or their examination on oath, or the examination upon oath of his, her or their servant or servants, that had the care of his or their houses, out-houses, corn, hay, straw or wood, before any justice of the peace of the county, liberty or division where such fact shall be committed, inhabiting within the said hundred where the said fact shall happen to be committed, or near unto the same, whether he or they do know the person or persons that committed such fact, or any of them; and if upon such examination it be confessed that he or they do know the person or persons that committed the said fact, or any of them, that then he or they so confessing shall be bound by recognisance to prosecute such

against the said men inhabiting in the said hundred of *East Hundred* by reason of the taking and carrying away of the said 29l. 10s. in monies numbered &c. But because it is unknown to the court what damages the said *Christopher* has sustained by means of the premises last mentioned, the sheriff is commanded that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the said

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Inquiry awarded.

“such offender or offenders by indictment or otherwise according to the laws of this realm :” and by section 9, “Provided also, that where any offence shall be committed against this act, and any one of the said offenders shall be apprehended, and lawfully convicted of such offence within the space of six months after such offence committed, no hundred, or any inhabitants thereof shall in anywise be subject or liable to make any satisfaction to the party injured, for the damages he shall have sustained.” And by the 10th section, the party sustaining any damage by reason of any offence committed contrary to this act, shall commence his action or suit within one year next after such offence shall be committed.

The action being given by this statute against *the inhabitants of the hundred*, the plaintiff can only proceed against them by original as he must on the statute of 13 Edw. 1. of hue and cry. But the action, both upon this act and the before-mentioned one of 1 Geo. 1., must be brought in the name of the party grieved only, and ought not to be a *quasi tam* action, (though it is sometimes so brought, 3 Wils. 318. *Allen, qui tam*, v. *Hundred of Kirton*.) for the inhabitants

are not guilty of any contempt of the king in either of those cases, as they are for neglecting to pursue and apprehend the robbers as required by the statute of Edward the first. In this case too, no action will lie against the hundred at the suit of the party injured, unless the act which occasioned the damage amounts to a felony within this statute.

Although the words of the first section of the statute are “*unlawfully and maliciously*,” yet it is not necessary to use those precise words in the declaration; therefore where the action was for the damages the plaintiff had sustained by setting fire to two stacks of oats, which in the declaration was laid to have been *feloniously* done by some person or persons unknown; after verdict for the plaintiff it was moved in arrest of judgment, that the declaration was bad, because it was not alleged that the setting fire to the stacks was done *unlawfully and maliciously* according to the words of the statute. But the court were unanimously of opinion that it was not necessary; for though the burning must be unlawful and malicious to constitute the offence, yet the statute doth not make use of any technical words that are absolutely necessary to be inserted in the declaration, but leaves the

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said *Christopher* has sustained, as well by means of taking and carrying away the said 29l. 10s. above mentioned, as for his costs and charges by him about his suit in this behalf expended; and that he send the inquisition which he shall thereupon take to our said lord the king in the octave of St. *Hilary* wheresoever &c. under his seal, and the seals of those by whose

the plaintiff to allege and prove *quo animo* the stacks of oats were set on fire; here he has alleged that the same was committed feloniously; and it must be presumed after verdict, that it was done maliciously and unlawfully. 3 Will. 318. *Allen v. Hundred of Kinton*. 2 Black. Rep. 842. S. C.

The declaration after setting out the offence ought to shew that the plaintiff gave notice of it within two days, and within four days after gave in his examination upon oath before a justice of peace, and that six months have elapsed, and the offender not taken; or if plaintiff knew the offender he should state that he entered into a recognisance to prosecute him, and that six months are elapsed, but the offender not taken. It should seem upon the principle of the before-cited case of Hob. 139. *Norris v. Hundred of Gawtry*, that the two days to give notice to the inhabitants, and the four days to give in his examination, are to be reckoned both inclusive. Where the notice of the fact was given within two days to the inhabitants of the *parish* (instead of the "town, village, or hamlet,") near the place, &c.; yet as the law *prima facie* intends every *parish* to be a *vill* unless the contrary be shewn, it has been holden, that this allegation is sufficient

after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial that the parish consisted of several *vills*, and that the notice had been given to one vill more distant than another, the defendants would have been intitled to a verdict. 8 East. 173. *Cook v. Hundredors of Pimhill*. If the plaintiff recovers he is intitled to his costs, though by that means the damages and costs should exceed 200l. 1 Term Rep. 71. *Jackson v. Inhabitants of Calesworth*. And if the plaintiff be nonsuited, or there is a verdict for the defendants, they will have their costs. 3 Burr. 1723. *Greetham v. Inhabitants of Theale*. The defendants may plead not guilty.

The oath must be positive whether the plaintiff knew the persons who committed the offence or not. As where in an action on this statute the oath proved was, that the plaintiff *had good reasons to suspect* the fact was done by R. G. and W. L. both of such a parish; the court of K. B. held that the examination did not maintain the action. The oath required is a condition precedent, and for the sake of the hundred, and to prevent screening the offenders. There is a great deal of difference between *suspecting* and *knowing*; a man who knows the offender may purposely stop

whose oath he shall take that inquisition, together with the writ of our said lord the king to him thereupon directed; the same day is given to the said *Christopher* &c. At which day here comes the said *Christopher* by his attorney aforesaid, and the sheriff, to wit, *Thomas Barker* esq. now here returns a certain inquisition taken before him at *Okeham* in the county aforesaid, on the 13th day of *January* last past, by the oath of twelve good and lawful men of his bailiwick, by virtue of the said writ; by which it is found that the said *Christopher* hath sustained damages by means of the premises last mentioned, over and above his costs and charges by him about his suit in that behalf expended, to 30l., and for those costs and charges to sixpence. Therefore it is considered that the said *Christopher Pinckney*, otherwise *Pinkney*, do recover against the said men inhabiting in the said hundred of *East Hundred* his damages aforesaid to thirty pounds and sixpence by the said inquisition in form aforesaid found, and also 9l. 19s. and 6d. for his said costs and charges, by the court here adjudged of in-

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tants DE
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Inquisition re-
turned,

Judgment.

stop at the word suspect to avoid being bound to prosecute: and though it would be equivocating, yet it would hardly be a perjury assignable; it being only a suppression of part of the truth. He should have said, *I suspect them to be the men, but I do not know it.* It will be dangerous to go out of the words of the act. 2 Str. 1247. *W. King v. Inhabitants of Bishop's Sutton.* So in *Tburtell v. Inhabitants of Mutford*, 3 East. 400. it was held to be a condition precedent, that the party grieved should within the time limited give in his examination on oath before a magistrate, whether or not he knew the offender, or offenders, or any of them; and therefore an examination on oath, in which the party only swore that he suspected that the fact was done by some person or persons to him unknown, was adjudged to be not suffi-

cient within the statute, and still less in support of an averment in the declaration, that he gave such examination &c. in and by which it appeared that the plaintiff did not know the person or persons who committed the fact. For non constat by the terms of such examination, that the plaintiff did not know some of the offenders, if there were several.

There are other statutes which make the hundred liable to the action of the party injured, such as 8 Geo. 2. c. 20. for destroying turnpikes, or works on navigable rivers: 10 Geo. 2. c. 32. for cutting hop-binds: 11 Geo. 2. c. 22. for destroying corn to prevent exportation: 19 Geo. 2. c. 34. for wounding officers of the customs, and 29 Geo. 2. c. 36.

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crease to the said *Christopher* and with his assent; which said damages in the whole amount to 40l. And the said men dwelling in the said hundred of *East Hundred*, in mercy &c.

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Pinkney *versus* The Inhabitants of East Hundred
in the County of Rutland.

Pasch. 23 Car. 2. Regis. Rot. 282.

S. C. 2 Keb.
821, 822.

A declaration on the statute of hue and cry is insufficient, unless the plaintiff shews the particulars of the goods taken and carried away, and that they were his goods: and it is not enough to say generally that they were in his possession. If a declaration be good in part, and bad in part, and the defendant demur to the whole declaration, the plaintiff shall have judgment for that part which is good.

The goods must be specified in the declaration, in this action, though not in the writ.

ACTION on the statute of hue and cry. The plaintiff shews in his declaration, "That certain offenders, to wit, men to the said plaintiff unknown, on the 10th day of *October* in the 22d year of the reign of the now king, in the king's highway within the said hundred of *East Hundred*, to wit, at the parish of *Tickenwate* in the said county of *Rutland*, with force and arms, that is to say, with swords, clubs and knives, made an assault upon him the said plaintiff, and 29l. 10s. in monies numbered of the proper monies of the plaintiff then there found, and divers goods and chattels being in the custody of the said plaintiff to the value of 39l. 19s. 9d. then and there likewise found, of and from the said plaintiff feloniously took, robbed and carried away, against the peace of our lord the king &c." but did not shew the particulars of the goods, or that they were his own goods; for he only said that the goods were taken and carried away out of his possession, and not that the goods of him the said plaintiff were taken and carried away: and for this the defendants demurred to the whole declaration.

And this term the said objection was moved on the part of the defendants. And it was admitted by *Saunders* of counsel with the plaintiff that the declaration was insufficient in that part, because the goods are not specified (13) particularly in

(13) This action, being in the nature of an action of trespass for taking goods, ought to have as much certainty

as an action of trespass, or trover. But an action of trespass or trover for taking divers goods and chattels of the plaintiff;

the declaration, though they need not be so in the writ; and also because the goods are not said to be the goods of the plaintiff; and if they are not, (as they shall not be intended to be unless the plaintiff has so declared,) then the plaintiff cannot maintain an action for them although they were in his possession, but the person who has the property of them ought to have the action; see for this Cro. Jac. 46. (b) and Styles Rep. 54. (c)

But he said that the declaration for the money was good and sufficient, and therefore the plaintiff ought to have judgment for that which is good, because this action is in the nature of a trespass, in which damages are to be recovered, and is therefore divisible; wherefore the plaintiff ought to have judgment for that which is well laid, and be barred for the residue. As if an action of covenant be brought, and divers breaches are assigned, and some are good and the others bad, if the defendant demur to the whole declaration, the plaintiff shall have judgment for those breaches which are well assigned, and shall be barred for the residue. And of this opinion was the whole court without any difficulty; (14) and judgment for the plaintiff as to the money; and he en-

tered

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tants DE
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(b) Burser v.
Martin.

(c) Wood v.
Salter.

In trespass the
damages are di-
visible.

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If in covenant
some of the
breaches are
good, and the
others not, and
the defendant
demurs to the
whole declara-
tion, the plain-
tiff shall have
judgment for the
breaches which
are well assigned,

is too general; and if a verdict be found for the plaintiff, judgment will be arrested. 2 Ld. Raym. 1410. *Wiatt v. Effington*. S. C. 1 Str. 637. Fort. 377. 4 Burr. 2455. *Bertie v. Pickering*. 2 Ld. Raym. 1007. *Martin v. Henrickson*. So with respect to averring the goods to be the plaintiff's, that is certainly necessary; because it is an established rule that neither trespass nor trover will lie for taking of goods, unless at the time of taking, the property was in the plaintiff. See 1 Ld. Raym. 239. *Fontleroy v. Aylmer*. Cas. temp. Hardw. 118. *Franklyn v. Reeves*. 2 Str. 1023. S. C. 2 Lutw. 1509. *Daile v. Coates*. (14) So in trover for several things,

and among the rest *de duobus fulcris*, which is insensible; the defendant demurred, and Holt C. J. refused to give judgment *quod nil capias*, saying, the plaintiff may take several damages, and release as to this, and then take judgment as to the rest, and all would be well. 1 Salk. 218. *Benbridge v. Day*. So if there are several counts in the declaration, some good and some bad, and the defendant demurs generally to the whole declaration, the plaintiff shall have judgment for so many of the counts as are good. 1 Sand. 286. *Duppa v. Mayo*, note (9). Com. Dig. Pleader, (C. 32.)

(15) So

(b) Oldfield v.
Hundred of
Whitherley.
(c) Bressley v.
Humphreys.

tered a *remittit damna* for the goods. See Cro. Jac. 348. (b) 557. (c)

Note; In fact the plaintiff was a common carrier and answerable for the goods to the owner, and might have well maintained (15) an action for the robbery of them, if he had laid it accordingly.

(15) So a servant who is robbed in his master's absence, may maintain an action against the hundred, and declare that he was possessed *as of his own proper goods*; and though the jury find that he was robbed of his *master's* money, yet he shall recover, for the servant is possessed *ut de bonis propriis* against all, and in respect of all, but him that has the very right; 3 Bac. Abr. 69. 4 Mod. 303. *Combes v. Hundred of Bradley*: or the master may in such case bring the

action in his own name; but then, as has been already observed, the servant must make oath that he knew not any of the robbers. Ibid. And the servant may maintain the action, and recover the whole that he has been robbed of, although the jury find that part of the things belonged to his master, and part to himself. Ibid. But if the servant be robbed in the presence of his master, the master must sue. Ibid.

Case 62.

Purefoy *versus* Rogers and others.

Pasch. 21 Car. 2. Regis. Rot. 428.

3 C. 1. Lev. 39.
3 Keb. 11.
A feme-covert
tenant for life,
remainder to her
son, if she should
have one; he in
the reversion in
fee, before the
birth of a son,
bargains and sells
the land and le-
vies a fine there-
of to the husband
and wife; the
particular estate
of the wife is
merged in the
reversion, and the
contingent re-
mainder de-
stroyed.

EJECTIONE FIRMÆ on a demise made by *Sampson Shelton* Broughton of 6 messuages, 6 curtilages and 6 gardens, with the appurtenances, in the parish of St. Olave's Hart-Street in London. On not-guilty pleaded, a special verdict was found at *Nisi Prius* in London to this effect; namely, That one *Sampson Shelton* was seised of the tenements in question in his demesne as of fee, and being so seised, on the 25th of October in the year of our Lord 1648, by his last will in writing devised the said tenements in this manner: "I do give unto my loving wife all my personal estate in leases, goods, plate, household stuff, and all my moveables whatsoever, and my inheritances of lands and houses I give her, being my loving wife, for her life, which I make executrix of this my last will. And if it shall please God to bless her with a son, if she cause it to be called by my christian name and surname, namely, *Sampson Shelton*, then I give my in-
heritances

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& others.

ritances of my lands and houses unto him after his mother's life ; and if he die before he come to the age of twenty and one years, then I give my inheritances of lands after my wife's life to my heirs for ever." And it was further found, that afterwards the devisor died seised without issue of his body, leaving *Isabel* his relict, who was his wife named in the will, and one *John Shelton* brother and heir of the said devisor; and that the said *Isabel* afterwards, to wit, on the first of *October* in the year of our Lord 1649, took one *Richard Broughton* to her second husband ; and afterwards, to wit, on the 21st of *October* 1649 aforesaid, the said *John Shelton* being the brother and heir of the said devisor by the deed indented and enrolled in Chancery, for the consideration of money, bargained and sold the said tenements in question to the said *Richard Broughton* and *Isabel* then his wife, to have to them and their heirs and assigns to their own proper use ; and that, on the morrow of *St. Martin* in *Michaelmas* term in 1649 aforesaid, a fine was levied of the said tenements by the said *John Shelton* to the said *Richard Broughton* and *Isabel*, to the same uses as were contained in the said indenture of bargain and sale. And the jury further found, that afterwards the said *Isabel* had issue, by the said *Richard Broughton*, the said *Sampson Shelton Broughton* the lessor of the plaintiff, their first son, who was born on the 8th *January* 1649 aforesaid, and that the said *Isabel*, on the 15th day of the said month of *January*, caused him to be christened by the name of *Sampson Shelton*, and that he always afterwards was called by the christian name of *Sampson Shelton Broughton*. And it was further found, that the said *Richard Broughton* and *Isabel* his wife afterwards, to wit, in *July* 1657, by indenture enrolled in Chancery, in consideration of money bargained and sold the said tenements to one *William Weston* in fee, and in *Michaelmas* term then next following levied a fine of the said tenements to the said *Weston* to the use of him and his heirs ; under which *Weston* the defendants claim by several mesne conveyances ; and afterwards *Broughton* and his wife died. And then the jury found the entry of the lessor of the plaintiff, and the lease to the plaintiff, and his entry, and the ouster by the defendants ; but whether the defendants were guilty or not, they prayed the judgment of the court.

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And

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And on this special verdict two points were moved; first, Whether the conveyance, namely, the bargain and sale and fine of the said *John Shelton* the heir of the devisor to *Broughton* and his wife in fee, before the birth of the said *Sampson Shelton Broughton* the lessor of the plaintiff, had so destroyed the contingency that the estate should never vest in the said *Sampson Shelton Broughton* the plaintiff's lessor? Secondly, Admitting that the contingency was not destroyed, then whether the will of the devisor was well observed in baptizing the lessor of the plaintiff by the *Christian* name of *Sampson Shelton*, so that the estate should vest in him according to the will or not?

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And *Saunders* for the plaintiff argued as to the first point, that by the conveyance of *John Shelton* to *Broughton* and his wife, before the birth of the lessor of the plaintiff, the contingent remainder was not destroyed. And first he submitted, that *John Shelton* the heir of the devisor had no reversion or estate in him, but it was *in abeyance*, because by the will an estate for life was given to the wife, and the remainder in fee to his son on the said contingency; but if such son should die within the age of 21 years, then the tenements were devised to the right heirs of the devisor, so that there was a fee simple devised on a contingency: wherefore, before it could be known whether the contingency would happen or not, the reversion was *in abeyance*, and not in the heir, and then his conveyance did not give any estate to *Broughton* and his wife, but they were only tenants for life of the wife as they were before.

(b) 1 P. Will.
513. Carter v.
Barnardiston.

But *Hale* chief-justice interrupted (b) him, and said it was clear that the reversion was in the heir of the devisor by descent, and was not in abeyance (1).

(1) This opinion of Lord *Hale* is agreeable to what had been before determined in a case, where the testator devised land "to his eldest son *Thomas* for life, and if he died without issue living at the time of his death, to

"*Leonard* another son and his heirs,
"but if *Thomas* had issue living at his
"death, then the fee should remain to
"the right heirs of *Thomas* for ever;"
it was adjudged that *Thomas* took only
an estate for life, with a contingent re-
mainder

Wherefore *Saunders* passed over and said that notwithstanding this he conceived that the contingent remainder was not destroyed; and he took it for a ground, that where a remainder in *esse* is not divested or turned to a right, there a contingent remainder will not be destroyed; but in this case if

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mainder to *Leonard* in fee; and it was said by *Wyndham* and *Twyfden* justices, and agreed to by the other judges, that the fee descended to *Thomas* as heir until the contingency happened, and was not in abeyance; that in relation to *Leonard*, *Thomas* took only an estate for life, but in the mean time by operation of law, he had the fee in such sort that it should not merge the estate for life, but there should be an *hiatus* to let in the contingency when it happened; and it was compared to *Archer's* case. 1 Rep. 66. b. where, though *Robert* took an estate only for life by the will, yet by operation of law he had the fee also. Sir T. Raym. 28. *Plunket v. Holmes*. 1 Lev. 11. 1 Sid. 47. S. C. Lord *Hale's* opinion has been also recognized in a subsequent case, where Sir M. A. devised to E. for life, and in case E. should have issue male, then to such male and his heirs for ever, and after the death of the said E. in case he should leave no issue male, then to T. S. in fee. After the testator's death E., before he had any issue male, suffered a common recovery of the lands to himself in fee: it was held that the remainder to T. S. was contingent, and destroyed by the recovery; and then the question was, whether the remainder in fee to T. S. was in abeyance, or did descend to the testator's heir at law?

Sir *Joseph Jekyll*, then master of the rolls, held that the fee was in abeyance; but on appeal to Lord Chancellor *Parker*, he was of opinion that it was not in abeyance, but descended to the testator's heir at law; for wherever a remainder is devised in contingency, the reversion in fee descends to the heir at law in the mean time, and whatever estate is not disposed of by the testator descends to the heir, and cited this case of *Purefoy v. Rogers*, and the before mentioned case of *Plunket v. Holmes*, as in point: and therefore he held that the heir of the testator, having the reversion in fee descended on him, had a right of entry commencing upon the forfeiture which the tenant for life had incurred by suffering the recovery. 1 P. Will. 506. *Carter v. Barnadiston*.

It seems however that in *common law* conveyances it was holden, that the remainder in fee of an estate depending upon a contingency was in abeyance: As where a feoffment was made for life, remainder to the right heirs of T. S. who was then alive, the fee-simple was supposed to be in abeyance until T. S. died. Co. Litt. 342. b. This was founded on an ancient principle of law, that every remainder must pass out of the grantor at the time of the livery. But in conveyances which have their operation from the statute of *uses*, it

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if the contingent remainder had been in *esse*, it would not have been divested by the acceptance of the reversion by *Broughton* and his wife, being tenant for life, from *John Shelton*, although it was by fine. Lord *Coke* in Co. Litt. 251. b. enumerating the several sorts of forfeitures by alienation, says

was always a rule that the fee remains in the grantor and his heirs until the contingency happens. Carth. 262, 263. *Davis v. Speed*, per Holt C. J. In *Cunningham v. Moody*. 1 Ves. 177. I. d. *Hardwicke* observes, that it is certain that where no person is seen or known, on whom the inheritance can vest, it may be in abeyance: as on a limitation to several persons and the survivor, and the heirs of such survivor, because it is uncertain, who will be the survivor: but the freehold cannot, because there must be a tenant to the præcipe always. There seems, however, to be no reason why the fee does not remain in the grantor and his heirs till the contingency happens. See Harg. Co. Litt. 191. a. note (1).

However, although it is now established that where a remainder in fee is devised in contingency, the reversion descends to the heir until the contingency happens, yet it is to be observed, that such descent does not merge the estate for life, for that would be to destroy the contingent remainder. This appears by the above-mentioned case of *Plunket v. Holmes*, and *Archer's* case there cited. And the same principle is to be collected from other cases; for wherever there is a devise to an heir at law for life, with contingent remainders either in tail, or in fee, according

to an event which is to happen on the death of tenant for life; although the reversion in fee descends on the tenant for life during his life, yet it does not merge the estate for life, nor is it executed in possession so as to intitle the husband of tenant for life to the estate by curtesy, or his wife to dower; for the inheritance, as well as the estate for life, is determined by the death of tenant for life, and has no continuance after. Thus where Sir H. B. devised lands to his sister A. B. who was his heir, and her assigns for life, and if she married, and had issue male of her body living at the time of her death, then to such issue male, and to his heirs-male for ever; but if she died leaving no issue male at the time of her death, then to G. B. and his heirs for ever. A. B. married, had issue a son, and died, and the son survived. It was holden, that the descent of the fee on A. B. did not merge her estate for life, or destroy the contingent remainders, and that the inheritance was never executed in possession in her to intitle her husband to be tenant by the curtesy; for wherever the inheritance is to be determined, by express limitation, or condition, upon the death of the wife, the husband shall not be tenant by the curtesy. 9 Mod. 147. *Boothby v. Vernon*. So where W. D. was tenant for life, remainder to

says, that some are by devesting, as by levying a fine of land which lies in livery, and this devests a remainder, or reversion; but a fine levied of a *reversion* or rent, or such like things which lie in grant, although it makes a forfeiture, yet it is no devesting of the reversion or remainder, as it is there said.

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to T. S. and his heirs for the life of W. D., remainder to the heirs-male of the body of W. D., remainder over; W. D. died without issue leaving a wife; the question was, whether she should be endowed, that is, whether the remainder to T. S. and his heirs for the life of W. D. was such an interposing estate between W. D.'s estate for life, and the remainder to the heirs of his body, as should prevent his wife from being dowable. And it was argued that the whole estate was really in W. D. and the remainder to T. S. and his heirs for the life of W. D. was only a possibility, that if W. D. committed a forfeiture, T. S. should take the advantage of it for the preservation of the remainders; but in the mean time all the estate was executed in W. D.; as in *Leavis Bowles's* case 11 Rep. 80. a. the whole estate-tail was executed in the father until the birth of the first son; and though by this possibility the estate for the life of W. D. was not merged, yet the intail was executed to such purpose that the wife should be endowed; but the court suddenly on the first argument adjudged that the wife was not dowable. 3 Lev. 437. *Duncomb v. Duncombe*. However, notwithstanding this seeming disapprobation of the case by the reporter, it is unquestionably good law, and has been re-

cognized and approved of in all subsequent cases, and particularly so by Lord *Hardwicke* in *Hooker v. Hooker*, Cal. temp. Hardw. 17. Ambl. 756, 757. *Wyndham v. Earl of Egremont*, and by *Lee C. J.* in *Smith v. Parkhurst*. 18 Vin. 15. Although this case does not establish the former part of the before-mentioned proposition, That the inheritance descending on the heir does not merge his estate for life; yet as it very fully proves the other part of it, That the inheritance must be executed in possession, to intitle the husband to an estate by curtesy, or the wife to dower, it therefore seems a proper case to be mentioned here..

Indeed, in the case of *Kent v. Harpool*, 1 Vent. 306. Sir T. Jones, 76, 77. Pollexf. 306. S. C. where grandfather tenant for life, remainder to the father for life, remainder to the first son of the father in tail, reversion to the grandfather in fee; the grandfather died before any son was born to the father, but afterwards a son was born; and whether the descent of the fee to the father did destroy the contingent remainder, was the question; and after argument the court seemed to be of opinion, that the contingent remainder was destroyed by the descent of the fee on the father, and *Rainsford C. J.* relied upon *Wood v. Ingersole*. Cro. Jac. 260.

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said. And here the fine by the said *John Shelton* was levied only of his reversion, so that it would not divest any estate, and consequently did not destroy the contingent remainder. And it was clear, that if the reversion had been granted to a stranger, and the particular estate for life had remained as it was originally, the contingent remainder might have vested when

It is not certain whether this case was ever determined by the court; for in the report in *Ventris* it is said to have been adjourned; and *Pollexfen* in his report says that the case was never adjudged, but went off on some defects in the writ of error, but the court inclined to affirm the judgment. However, the authority of the case has been impeached since; it was denied by *Reeve* justice, who said it was founded on *Wood v. Ingersole*, Cro. Jac. 260. which in *Fortescue v. Abbot*, 2 Lev. 202. Sir T. Jones, 79. was resolved not to be law. Cas. temp. Hardw. 16.

But it seems to me, that if in this case the father had died *without having had any son*, leaving a wife, she would have been entitled to dower; for then there would have been no occasion for the estate to open and let in the estate to the son, because the contingency never happened, and by the father's death could not possibly happen, but was intirely determined, and the fee continued a vested one and executed in possession in the father until his death, and afterwards descended to his heir. And this opinion seems to be fortified by the case of *Hooker v. Hooker*. Cas. temp. Hardw. 13. where lands were conveyed to the use of W. H. the elder for life, and to his wife if she sur-

vive, then to W. H. the younger for life, who was the son and heir apparent of W. H. the elder, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to W. H. the elder in fee. W. H. the elder and his wife died without other issue in the life-time of W. H. the younger, whose wife also died; he had two other wives; and the last being the plaintiff, and *he being dead without issue*, the question was, whether this last wife was entitled to dower in these lands? The court of K. B. determined that she was; because there was nothing but a possibility which never happened, nor could under the circumstances possibly happen, to distinguish that from an estate in fee; for it was impossible the contingent remainders should ever happen, inasmuch as W. H. the younger was dead without issue; and the case of *Boothby v. Vernon* was distinguishable, because there the wife was but a bare tenant for life, with a possibility to her issue. The case of *Hooker v. Hooker*, is recognised by Lord Eldon in *Doe v. Scudamore*. 2 Bos. & Pull. 294. See 1 Vent. 345. *Anon.* Sir T. Jones 136. Sir T. Raym 413. L. C.

This way of considering these cases seems to me to remove the doubt, and explain the difficulty drawn by Mr.

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when it came in *esse*; for a remainder does not depend upon a reversion which comes after it, but upon the particular estate which precedes it; and therefore if there be tenant for life, remainder for life in contingency, remainder over for life in *esse*, if he in remainder for life in *esse* forfeits his remainder by the levying of a fine, yet the contingent remainder will vest if it happens during the first estate for life on which it depends. For where the particular estate precedent continues either in *esse* or in right of entry, it is sufficient to support the contingent remainder, as it was adjudged in this court in the case of *Lloyd v. Brooking* in *Hilary* term last past (*d*). But it may be objected, that here the tenant for life has accepted a grant of the reversion, and therefore the estate for life is merged, so that it does not continue in *esse* to support the contingent remainder; to which it may be answered, that the possibility of the contingent mesne estate preserves the estate for life, and disjoins the reversion: as in *Cro. Eliz.* 316. *Cordall's* case, where lands were given to *Edward Cordall* for life, the remainder to his first son in tail, he then having no son, remainder to the heirs of the body of the said *Edward Cordall*; it was resolved by *Gawdy* and *Anderson* that the estate-tail was not executed in *Edward Cordall* during his life for the possibility of the mesne estate, which might intervene by the birth of a son, and therefore his wife should not be endowed (*b*): and there is no difference between *Cordall's* case and the present, except only that there the estate for life and the estate-tail were limited and created together and granted to one person at first, and here the reversion and the estate for life came to the same person at several times by several conveyances, which, as he conceived, did not make any difference. But admitting that the estates in the present case are united, yet the contingent remainder may nevertheless well arise, and disjoin them again; and for this he cited *Co. Litt.* 28. a. where it is said that, if there be a feoffment to the use of husband and wife for

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(*d*) 1 Vent. 188.
Lloyd v. Brooking.

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(*b*) See post,
386.

Fearne from them, in his essay on contingent remainders. See *Fearne Cont.* Rem. 262—269. 3d edit.

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their lives, remainder to the first son in tail, remainder to the husband and wife and the heirs of their bodies, they having no issue male, in this case they are tenants in tail executed, but yet if they have a son born then they become tenants for life, remainder to the son in tail, remainder over to them in tail. So that by these cases it appears, that whether the estates in *esse* are united or not, yet there is nothing which prevents the arising of the contingent remainder when it comes in *esse*. But he said that in all cases where the particular estate is determined by *alienation*, there the contingent remainder is destroyed, as appears in Cro. Car. 102. (2) *Biggot v. Smyth*.
2 Roll.

(2) Which was this : A man seized of land in fee conveyed it by feoffment to the use of himself and wife, and to the heirs of the survivor of them. The husband afterwards made a feoffment of this land, and died ; the wife entered and died. The question was, whether by the wife's entry the fee should vest in her surviving, so as her heirs should enjoy it ? And it was adjudged that the feoffment of the husband had destroyed the contingent use of the fee ; for whatsoever cannot accrue at the time of the death of the party who first dieth, cannot afterwards by any act be revived, but is absolutely extinguished.

This case is rather obscure, but the principle established by it is, That such a right of entry, as will support a contingent remainder, must be antecedent to, as well as exist at, the time when the contingency happens : for if the right of entry, and the contingency arise at the *same time*, the contingent remainder will never take effect. In this case, there was no right of entry in the wife until the death of the husband,

when the contingent remainder was to have vested. They both happened at the *same instant* ; therefore the court held, that this right of entry in the wife did not preserve the contingent remainder and prevent its being destroyed by the feoffment of the husband. It was this that made Lord Holt say, in *Thompson v. Leach*, 1 Ld. Raym. 316, " That the case of *Biggot v. Smyth*, was " nice to an instant, for the right (of " entry) ought to be *precedent* to support the contingency ; and therefore " there, because the right (of entry) " arose to the wife *eo instanti* that the " contingency happened, the remainder " was adjudged to be destroyed ; and " the case has always been held for " law." But if a precedent *right of entry* subsists at the time of the contingency, it is as sufficient to support a contingent remainder, as if the particular estate had continued until that time. As where tenant for life, with a contingent remainder, is disseised, all the estates are divested ; but the right of entry in the tenant for life will support the

2 Roll. Abr. 796, 797. 1 Rep. 66. b. *Archer's case*; but here the particular estate was not aliened, but only the reversion granted to it, which, as he conceived, did not prevent the arising of the contingent remainder.

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And as to the second point, Admitting that the contingent remainder was not destroyed, whether it vested in the lessor of the plaintiff by the baptizing of him by the Christian name of *Sampson Shelton*, or not? and this, he said, depended on the construction of the words of the will; for if the will was well pursued and observed by baptizing the lessor of the plaintiff by the Christian name of *Sampson Shelton*, then the remainder

the contingent remainder; but if a descent is cast, and five years pass before the contingency happens, whereby the right of entry is changed into a right of action by the statute 32 H. 8. c. 33. then the contingent remainder is destroyed and will never take effect 12 Mod. 174, 175. *Thompson v. Leach*. 2 Salk. 575, 576. 1 Ld. Raym. 316. S. C.

Archer's case above cited was this: F. A. seised of land in fee devised it to R. A. the father for his life, and afterwards to the next heir male of R., and to the heirs-male of the body of such next heir-male; R. had issue J.; F. died; R. enfeoffed K. with warranty, and afterwards R. died. First, it was agreed by *Anderson, Walmsley*, and the whole court, that R. had but an estate for life, because R. had an express estate for life devised to him, and the remainder is limited to the next heir male of R. in the singular number; and the right heir male of R. cannot enter for the forfeiture in the life of R., for he cannot be heir as long as R. lives. Secondly, that the remainder to the right heir

male of R. is good, although he cannot have a right heir during his life, but it is sufficient that the remainder vests *eo instanti* that the particular estate determines. Thirdly, which was the principal point of the case, it was agreed, that by the feoffment of the tenant for life the remainder was destroyed, for every contingent remainder ought to vest, either during the particular estate, or at least *eo instanti* that it determines; for if the particular estate be ended, or determined in fact, or in law before the contingency falls, the remainder is void. And in this case, inasmuch as by the feoffment of R. his estate for life was determined by a condition in law annexed to it, and could not be revived afterwards by any possibility, for this reason the contingent remainder was destroyed. But if the tenant for life had been disfeised, and died, yet the remainder is good, for there the particular estate doth remain in right, and might have been revested; but it is otherwise in the case at bar, for by his feoffment no right of the particular estate did remain.

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was vested; but if the will was not pursued, then it was clear that the contingent remainder would never arise, or vest in him. And he thought that the will and intention of the devisor was well pursued; and first he said, that the words were observed literally, for the words of the will are, "If he shall cause him to be called by my Christian name and surname, namely, *Sampson Shelton*;" and so it is done here, for the son was baptized and called by the name of *Sampson Shelton*, which was the Christian and surname of the devisor, and therefore the words literally observed. And the objection that he is also called by the surname of *Broughton* is nothing, for the will does not appoint that the son shall be called by the name of *Sampson Shelton* only, but if he be called by that name, he may also be called by any other name without violence to the words of the will: but the greater question is, Whether the intention be well observed? and he said, that it appeared to him that it was; for although it may be objected, that the devisor appointed that the son should be caused to be called by the Christian name and surname of the devisor, and here the son is christened by the name of *Sampson Shelton*, and therefore he cannot take upon himself the surname of *Shelton*, as, it may be collected, was the intention of the devisor; he answered that although the devisor has appointed that the son should be called by the Christian name and surname of the devisor, yet he did not appoint that the Christian name and surname of the devisor should be the Christian name and surname of the son, but that the son should be caused to be called by the Christian name and surname of the devisor; and so he is by baptizing him by the name of *Sampson Shelton*, and the words, "cause him to be called &c." are as much as to say, "cause him to be christened," by the Christian and surname of the devisor. And if the devisor had not so intended, it would be altogether uncertain whether the remainder would ever vest or not, and *when* it would so vest, and *what act* would be sufficient to make the remainder vest in him; for admitting that the son had been christened by the name of *Sampson* only, it may be asked, whether an individual calling of the son by the Christian and surname of *Sampson Shelton* would make the remainder vest in him? and that if the

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the private family had called him by the surname of *Shelton*, but all strangers had called him by the surname of *Broughton*, and if he be generally called by the surname of *Shelton*, but sometimes he is also called by the surname of *Broughton*, it may likewise be asked, at what time this remainder shall vest? whether at the time when he was first called by the surname of *Shelton*, or afterwards? And if he should be called by the surname of *Shelton* for the first five years of his age, and afterwards by the surname of *Broughton*, shall the remainder vest in him or not? Surely it will never be reduced to any certainty. And although the law will presume a testator ignorant of the law, and *inops consilii*, it is always in support of a will; and for the same reason the law presumes the testator to know the law as well as any other, and therefore in this case it is to be intended that the testator well knew that if he had appointed that the son should take upon him his surname, it would be altogether uncertain at what time the remainder would vest, and whether it would ever vest or not; wherefore it is not to be interpreted that it was intended that the remainder should vest in the son before he was capable of taking upon himself any name, and therefore his intention is shewn. And the rather because he has appointed the mother of the son to cause him to be called (for by reason of his infancy he could not call himself) by the Christian and surname of the deviser as soon as the deviser intended the remainder should vest, and therefore it ought of necessity to be before the infant was capable to take upon himself any surname. And beside, it would be absurd to say, that the deviser has appointed the mother of the son to cause him to be called by such a name, which it was not in her power to do, namely, to cause him to be called by the surname of *Shelton*; for it is wholly to subvert the will and intention of the deviser to construe it to be nonsense and absurdity, where it might as well be construed in good sense, and the will and intention of the deviser upheld by it: and it is clear that the deviser intended that the remainder should vest in the infancy of the son; for he has devised that if the son should die before his age of 21 years, the land should remain to his right heirs, therefore he intended that the son should have it in the mean time;

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wherefore it seemed to him that by this word "calling" in the will, the devisor meant "christening," and, "cause him to be called," to be the same thing with, "cause him to be christened." And as to the objection that, he said, might be made, that the devisor intended a perpetuating of his surname by his will, he said that the devisor has not expressed any such matter in his will, but if the defendants would collect it out of the words as they are in the will, they may as well collect that he intended also to perpetuate his Christian name. which is absurd to imagine; for he does not only injoin his surname, but his Christian name also to be imposed on the son, but he does not mention that either the one name or the other should continue longer than the life of such son. And besides, it is but a slippery or fragil mean of perpetuating his surname, for he devised a fee-simple to the son, which the son might have aliened, or the tenements might descend to daughters who would change their names by marriage, or they might descend to a collateral heir of another surname; and therefore it cannot be intended that by this means the devisor intended to perpetuate his name longer than for the life of such son: Wherefore he concluded both points for the plaintiff, that the contingent remainder was not destroyed, and that it vested in the lessor of the plaintiff by christening him by the name of *Sampson Shelton* (3). And so he prayed judgment for the plaintiff.

(3) An estate was devised to the devisor's sister for life, remainder to *Ambrose Saunders* in tail, with several remainders over in tail, reversion to himself in fee, "provided always, and this devise is expressly upon this condition, that whenever it shall happen that the estate shall descend or come unto any of the persons herein before named, that he or they do and shall change their surname, and take upon them and their heirs the surname of *Wykes* only, and not otherwise;" but

in this proviso there was no devise over: but there was another proviso prohibiting waste, in which there was a devise over, to the person next intitled to the premises, if the place wasted. The tenant for life, and *Ambrose Saunders* the first tenant in tail, were the devisor's heir at law; the tenant for life died, and *Ambrose Saunders*, who was then become the devisor's sole heir, entered, but never changed his name of *Saunders*, nor took the name of *Wykes*; he suffered a common recovery to the use of himself

Hale chief justice said to *Saunders*, that he had taken his foundation too large; for he said, that in all cases where the particular estate is merged in the reversion, there the contingent remainder is gone, though there is no divesting of any estate; and therefore he said that if there be tenant for life, remainder in tail in contingency, remainder over in tail in *esse*, if tenant for life and he in remainder in tail in *esse* levy a fine of their estates, this is no discontinuance, or divesting of any estate, because each of them gives such estate as he has, according to the rule in *Bredon's* case, (b) and yet the mesne (b) 1 Rep. 76. a. contingent remainder is thereby destroyed (4).

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himself in fee, and died; the person next in remainder made an actual entry into the premises for a breach of the proviso by *Ambrose Saunders* not taking the name of *Wykes*: And the court held that this was not a limitation or conditional limitation, but a condition, and also a condition subsequent; and that the estate-tail did not cease upon *Ambrose Saunders's* not taking the surname of *Wykes*, and go over to the plaintiff who was the next in remainder; and that the condition was destroyed by the recovery suffered by *Ambrose Saunders*, and the plaintiff had no title. 4 Burr. 1929. *Guliver v. Ashby*. 1 Black. Rep. 607 S. C. 1 Will. 130. *Rhenish v. Martin*.

(4) But if tenant for life accepts a fine come ceo &c. from a stranger, though this is a forfeiture, so as to intitle a remainder-man to enter, for he thereby affirms on record the reversion to be in a stranger, Co. Litt. 252. a. yet it does not displace or divest the remainder, 9 Rep. 106. b. *Margaret Podger's* case; therefore where A. was tenant for life,

remainder to his first son in tail &c., remainder to B. for life, remainder to his first son in tail &c., A. having a son, accepted a fine from B., and then made a feoffment in fee; then B. had issue a son; it was resolved, that the acceptance of the fine displaced nothing; and though A.'s feoffment displaced all the estates, yet the right of entry in the son of A. supported the contingent remainders. 1 Vent. 183. *Lloyd v. Brooking*. So if there be a tenant for life of a copyhold estate with a contingent remainder over, a surrender of the estate by tenant for life, before the contingency happens, will not destroy the contingent remainder, because the freehold and inheritance is in the lord. 2 Roll. Abr. 794. pl. 6. *Pawley v. Lowdall*. Sty. 249. 273. S. C. 2 Vern. 243. *Mildmay v. Hungerford*. So where *cestui que trust* for life makes a feoffment or any other conveyance, it is no forfeiture of his estate, nor does it destroy a contingent remainder depending on it; because having no legal estate in him, any conveyance made by him

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Holt junior of *Gray's Inn* argued for the defendants, that here the contingent remainder is destroyed by the conveyance of the reversion to the particular estate before the contingency happened. And as to *Cordall's* case, he said it was not law, and is denied by several books. And the case in Co. Litt. 28. a. before cited, is an express authority against the resolution in *Cordall's* case (5). He also cited Cro. Jac. 260. *Wood v. Ingersole*, that where a man having three sons, *John*, *Edward* and *William*, devised to *John* his son his lands in A. and to *Edward* his lands in B., and to *William* his lands in C., and that if any of them died the others surviving should be his heir; and afterwards *John* the eldest who was heir to the devisor, had issue and died; and whether the land in A. so devised to *John* should remain to his two brothers *Edward* and *William* was the question. And it was adjudged that the estate devised to *John* being only an estate for life, and the reversion and inheritance descending to him as heir, his estate for life was merged; wherefore the remainder being only a contingent remainder was, as he said, destroyed, and could not revive or take effect after the death of *John* (6). And he further said, that if the reversion once came to the particular estate in any way whatsoever, the particular estate is merged; and for this he cited *Wiscot's* case (d), that if there are three jointenants for life, and the reversion is granted to one

passes only what he can lawfully grant, and a right of entry resides in the trustees in whom the legal estate is vested. 2 Freem. 213. *Penhey v. Hurrell*.

(5) It was also denied by Lord *Hardwicke* in *Hooker v. Hooker*. Cas. temp. Hardw. 17. who said that it was denied in 2 Saund. 386. and in a like case in the C. B. by *Bridgman*.

(6) This case is incorrectly reported in *Croke*, but rightly in 1 Bulf. 61. In the report of the case in *Croke* there is a mistake, both as to the state of the

case, and the judgment. It is said by the court in *Fortescue v. Abbot*. Pollex. 481. Sir T. Jones 79. that upon inspection of the roll, which is 7 Jac. 1. K. B. Roll. 155. the words were, "If any of my sons die, the one to be the other's heir:" which were adjudged void, inasmuch as they imported no certainty which of the survivors, or whether both, should have the share of the son dying, and judgment was given for the defendant.

one of them; now the jointure is severed for the third part of that jointenant to whom the reversion is so granted; which proves, as he said, that the particular estate was merged in the reversion. And he said also, that here *Broughton* and his wife took by entirety, and he cited Litt. f. 291. (e) to this purpose, which was not denied; therefore the estate for life in the wife in the whole tenements was totally merged. —And as to the other point he did not say any thing, because, as he said, it was clear that the remainder was destroyed before the contingency happened, and so that point could not come in debate.

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(e) Co. Litt.
187. a. b.

Hale chief-justice. By the bargain and sale and fine of *John Shelton* to *Broughton* and his wife, the estate for life in the wife was merged for the time, although the wife after coverture might waive the estate granted by the bargain and sale and fine, and claim her first estate for life; but the particular estate being once merged, the contingent remainder is wholly destroyed, though the particular estate should be revived again. For he said, that if the contingent remainder cannot take effect immediately on the first determination of the particular estate, whether it be determined by merger or surrender, or in any other way whatsoever, it will never vest afterwards, though the particular estate should come in *esse* again (7).

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If a contingent remainder cannot take effect on the determination of the particular estate, in what way soever it is determined, it cannot vest afterwards, though the particular estate should revive.

Wherefore

(7) So where T. L. devised land to H. L. for life, remainder to his first and other sons in tail-male, and for default of such issue, remainder over to R. L. in like manner, and died. H. L. married and died without issue, leaving his wife *enfeint* with a son; R. L. entered as in his remainder, and afterwards the posthumous son was born; and the question was, whether this son was intitled to the remainder under the limitation? And it was adjudged in the commonpleas, and that judgment affirmed in the king's bench, that such post-

humous son could not take, because he was not born when the particular estate determined; and that instantly on the death of H. L. the remainder limited over to R. L. vested in him, and could not be defeated, though H. L. had a son born afterwards. This judgment was afterwards reversed in the House of Lords against the opinion of all the judges, who were much dissatisfied with the reversal, and strongly blamed Mr. Baron *Turton*, before whom the ejectment was tried, for permitting so clear and certain a rule of law to be found

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Wherefore he said that here the contingent remainder was destroyed, and the plaintiff has no title. And he answered to the said case of Co. Litt. 28. a. that it was true where an estate in *esse*, and a contingent remainder, with the remainder over to him who had the first estate in *esse*, are limited together by *one and the same* conveyance, there the remainder in *esse* is vested until the contingent remainder comes in *esse*, and then the estates shall be opened and disjoined by the letting in of the contingent remainder, because they were

found specially. 1 Salk. 227. *Reeve v. Long*. 4 Mod. 282. 3 Lev. 408. Carth. 309. S. C. This however occasioned the statute 10 and 11 W. 3. c. 16. to be made, by which it is enacted, “ that
“ where any estate is, by marriage, or
“ other settlement, limited in remainder
“ to, or to the use of, the first or other
“ sons of the body of any person, with
“ remainder over to, or to the use of,
“ any other person, or in remainder to,
“ or to the use of, daughters, with re-
“ mainder to any other persons, any son
“ or daughter of such person born after
“ the decease of the father, may take
“ such estate in the same manner as if
“ born in the life time of the father,
“ although no estate be limited to
“ trustees to preserve the contingent
“ remainder.” It is observable that the statute is confined to *marriage or other settlement*; by which the legislature not only meant by implication to affirm the decision of the house of Lords, but also to establish, that the same principle should govern the case where the limitation was by deed or settlement. And if taken literally, the statute does not apply to the case of a posthumous son entitled to a remainder upon the

death of a stranger; though there is no doubt that the operation of the statute must be extended to all such children, whether they are the children of the person upon whose death the remainder takes place, or of some other person. 4 Vez. junior: 334, 335. 342. *Thellusson v. Woodford*. Since the statute, posthumous children are considered to all intents and purposes as actually born. Ibid. 334. 1 Term Rep. 634. *Roe v. Quarterley*

So a contingent remainder limited *by way of use*, must vest during the particular estate, or *eo instanti* when the particular estate ends. as well as where the contingent remainder is created by a conveyance at common law. 1 Rep. 178. a. *Chudleigh's case*. As where one makes a feoffment in fee, or covenants to stand seised, to the use of himself for life, and afterwards to the use of his first son in tail male; and before the birth of any son, makes a feoffment in fee, such feoffment will destroy the contingent remainder to the son. *Reylay's case* cited in Cro. Jac. 168. *Bould v. Wynston*. S. C. Cro. Eliz. 636, Moor. 545.

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all created together by the same conveyance, and therefore the estates shall be opened and closed as they are appointed by the original conveyance; but otherwise it is when the remainder *in esse* comes to the particular estate by any *grant or conveyance* made after the original conveyance, for there the contingent remainder will be destroyed; as in *Wiscot's case* (c) aforesaid, if lands are given to three men and to the heirs of one of them, now they are jointenants of the freehold, and the survivor shall hold place for his life; and there is no merger, because the fee and freehold are granted and created by the same conveyance and at the same time; but if lands are given to three men for life, and afterwards one of them purchases the reversion, now the jointure is severed for the third part, because the estate in jointure, which the purchaser had before, is now merged by the accession of the reversion to it.

(c) 2 Rep 60. h.
61. a.

Twydden justice doubted whether the deviser intended that the son which his wife should have by another husband should have the tenements, or whether he only intended that the son which his wife should have by the deviser himself should have the tenements devised. But the chief justice answered that it was clear that the son of his wife by any other husband should have the tenements, because he has enjoined such son to be called by his surname, which had been superfluous if he had meant only a son of his own body; and principally because the deviser appointed by his will that, if the son should die before the age of 21 years, the tenements should go to the right heirs of the deviser, which would have been superfluous, if he had not intended that the son of the wife by another husband should take by the devise; for after the death of the son of the deviser himself, the tenements would descend to the right heirs of the deviser, if the deviser had not appointed it so by his will. But on the first point of the case, that the contingent remainder was destroyed by the conveyance of the inheritance to *Broughton* and his wife being the tenant for life, whereby the particular estate for life was

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Where a contingency is limited to depend on an estate of freehold capable of supporting a remainder, it shall be construed to be a contingent remainder and not an executory devise.

merged before the birth of the son, the court gave judgment for the defendants *nisi* (8) &c.

Winnington for the plaintiff said, that he would not speak to the case, unless the estate limited to the son would enure by way of executory devise; to which the chief-justice answered, that clearly it was not an executory devise; *for where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise* (9); wherefore the defendants had their judgment; for it was not moved afterwards.

Note ;

“ (8) Lord Chief Justice *Willes* in delivering the opinion of the judges in the house of lords in the case of *Parkhurst v. Smith*, *Willes's Rep.* 338. says, “ that “ there are but two sorts of contingent “ remainders which do not vest; 1st, “ where the person to whom the remainder is limited is not *in esse* at the “ time of the limitation; 2dly, where “ the commencement of the remainder “ depends on some matter collateral to “ the determination of the particular “ estate. If the first limitation be to “ one for life, and the next limitation “ to the son of B. who at the time has “ no children, this is a contingent remainder of the first son A. If there be “ a limitation to A. for life, remainder “ to B. after the death of J. S., or “ when a third person then at *Rome* returns from thence, this is a contingent remainder of the second sort. “ In the first case, if the tenant for life “ should die before B. has a son born, “ the remainder never vests at all. And “ in the second case, if B. dies before “ J. S., or before the man returns from

“ *Rome*, the remainder never vests, because the death of J. S., or the return of the person from *Rome*, were “ both conditions precedent.”

(9) This rule, so laid down by Lord *Hale*, has been uniformly adhered to ever since. 4 *Mod.* 284. *Reeve v. Long. Skin.* 431. *Carth.* 310. *S. C.* 1 *Salk.* 224. *Lodding v. Kime.* 1 *Ld. Raym.* 208. *S. C.* 2 *Ves.* 616. *Southby v. Stonehouse.* *Com. Rep.* 372. *Walter v. Drew.* 2 *P. Will.* 32. *Gore v. Gore.* *Dougl.* 753. 3d edit. *Goodtitle v. Billington.* 3 *Term Rep.* 489. *Ives v. Legge*, in *notis.* 2 *Bos. and Pull.* 295. 298. *Doe v. Scudamore.* So where the testator devised to his wife *for life*, remainder to his son E. for 99 years, if he should so long live, and from and after the several deceases of his wife and son, to the heirs of the body of E. The mother died in the life time of E. the son; the question was, whether the devise to the issue of E. was good by way of executory devise, or was a contingent remainder? If the former, the plaintiff was entitled to recover; but if the latter, it was destroyed.

Note ; As the lessor of the plaintiff was living, there was no question made what estate he would have had by the devise, if the remainder had been vested in him, whether an estate for life, or in fee." But it seems to me, that he would have had a fee, because the devisor appointed that if he should die

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destroyed on the death of the tenant for life during E.'s life, for want of a particular estate to support it. Lord Kenyon in delivering the opinion of the court said, that if ever there existed a rule respecting executory devises, which had uniformly prevailed without any exception to the contrary, it was that which was laid down by Lord Hale in the case of *Purefoy v. Rogers*, that "where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise." That the rule applied to, and must govern the case before them. 3 Term. Rep. 763. *Doe v. Morgan*.

Executory devises bear a strong resemblance to contingent remainders, and owe their origin to that desire which the law has ever shewn to give effect to the clear and manifest intent of a testator, if by any means it can be done. 2 Will. 90. For where it was plain and evident that a testator intended a contingent remainder, but the limitation could not operate as such by the rules of law, there, in favour of wills, and to effectuate the intent, and also from a presumption that the testator was *inops concilii* at the time of making his will,

it was holden, that the limitation should take effect in another way, namely, as an *executory devise*; which was formed on the model of springing uses, which were well known and very frequent before the statute of uses; and are allowed since within certain prescribed limits.

A proper executory devise is, (1 Ld. Raym. 207.) where a testator devises a fee, but, upon the happening of a particular event, limits the inheritance over to another description of heirs. Such a limitation over cannot take effect as a *contingent remainder*, because it is an established rule of law that a fee cannot be limited after a fee. Co. Litt. 18. a. Vaug. 269. *Gardner v. Sheldon*. And therefore where an estate is *devised* to one and his heirs, and if he dies *without heirs*, it shall remain over to another, this last limitation is void. Vaug. 269. 271. Cro. Car. 57. *Hearn v. Allen*; except indeed where the limitation over is to a person who is a collateral heir of the devisee, in which case the word *heirs* is construed to mean *heirs of the body*, from the apparent intent: because it is impossible that the devisee should die without an heir, while the remainder man or his issue continue. Cro. Jac. 415. *Webb v. Haring*. Cas. Temp. Tal. 1. *Tyte v. Willis*. 1 P. Will. 23. Nottingham

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die within the age of 21 years, the tenements should go to the right heirs of the devisor, and therefore the devisor intended to give a fee to the son. For if he had meant to give only an estate for life to the son, it would have been to no purpose to appoint the tenements to remain to the right heirs of

Nottingham v. Jennings. Willes's Rep. 165. *Preslen v. Funnell.* 3 Lev. 70. *Parker v. Thacker.* 2 P. Will. 369. *Attorney-General v. Gill.* 1 Ves. 89. *Tilburgh v. Barbat.* Cowp. 234. *Morgan v. Griffiths.* S. P. admitted in *Gingen v. White.* Willes's Rep 352. *Goodright v. Dunham* Doug. 266, 267 So if lands are given *by deed* to one and his heirs, so long as J. S. has heirs of his body, remainder over in fee, the remainder is void, because the first taker has *a fee*, though it be a base and determinable one, Co. Litt 18. b.; which seems to be good law, notwithstanding the doubt which Lord *Vaughan* entertained of its authority. Vaug. 269. And where land was *devised* to the prior and convent of B., so that they should render to the dean and chapter of St. Paul's 14 marks a-year, and if they failed of payment, that their estate should cease, and the dean and chapter and their successors should have it, it was held by *Baldwin* and *Fitzherbert*, the two greatest lawyers of their age, that the limitation over to the dean and chapter was void; because the first devise carrying *a fee*, nothing after remained to be disposed of, Dy. 23. a. And though this doctrine is now exploded, yet it is to be recollected that the case of *Hinde v. Lyons.* 19 Eliz. 3 Leon.

64. 70. was the first case where the contrary received a solemn decision.

But if the contingency, upon which the limitation over after a fee was to take place, would happen within such a reasonable time as that the estate *devised* would not be rendered unalienable for a longer period, than an estate limited by way of remainder in *a deed* would be, it was thought it was but shewing a proper indulgence to men's wills to give effect to such a limitation under the name of *an executory devise*. As where a testator devised to T. and his heirs for ever, and if T. died without issue, *living* W., then W. should have those lands to him and his heirs for ever. All the judges agreed that it was a good limitation of the fee to W. by way of *executory devise*, upon the contingency of T.'s dying without issue in the life time of W, but not as a *remainder*; for one fee cannot be in remainder after another; and therefore a devise to one and his heirs, and if he die without heirs, remainder to another, is void, and repugnant to the estate, and the cases of *Willcocke* and *Hammond* cited in *Boraston's* case 3 Rep. 20. b. 21. a., and *Fulmerston v. Steward* were cited as in point. Cro. Jac. 590. *Pells v. Brown.* Bridg. 1. S. C. This is a leading case upon the subject, and has never been departed from

of the devisor, if the infant should die within age, for the law would have directed it without the appointment of the devisor. And therefore when the devisor makes a special appointment of it, it ought to be intended that the devisor gave a fee to the son: And the words of the will may well carry such construction, as I think. *Quære tamen &c.* (10).

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from, but is referred to in subsequent cases as the foundation of this branch of the law. 3 Term Rep. 146. *Porter v. Bradley*. 7 Term Rep. 596. *Roe v. Jeffery*. So where a testator devised to his mother for life, and after her death to his brother in fee; provided, that if his wife, who was then *ensient*, be delivered of a son, then the land should remain to him in fee, and dies; and a son is born; it was held that the fee of the brother should cease, and vest in the son by way of executory devise on the happening of the contingency. Dyer, 127. a. *in margine*. So where lands were devised to G. P., his heirs and assigns for ever; but if he happen to die before he attain the age of 21 years, *leaving no issue living at the time of his death*, then over to C. in fee; this was held to be a good executory devise to C. 2 Will. 29. *Goodright v. Searle*. So where there was a devise of lands to B. in fee, and of other lands to C. in fee, provided that if either died before he was married, or before 21 and without issue, then the estate of him so dying should go to the survivor; it was adjudged that each took a fee with an executory devise over to the survivor. 1 Roll. Abr. 835, 836. *Hanbury v. Cocherell*. So where J. D. devised to his son P. D., his heirs and assigns for ever, but in case P. D. should happen to die *leaving no*

issue behind him; then over; it was contended, that there was no case of real property where the words "leaving no issue" were to be confined to "leaving no issue at the time of the devisee's death," unless particular words were added, which necessarily limit them to that meaning; and that the contingency in that case, which was not to take place till an indefinite failure of issue of P. D. was too remote; and that Lord *Macclesfield* took a distinction in *Forth v. Chapman*. 1 P. Will. 663. between real and personal property, namely, that "dying without issue," as applied to *personal* estate must be taken to mean dying without issue *at the time of the death*; but as applied to *freehold*, they meant an *indefinite* failure of issue; and that this distinction was recognised by Lord *Hardwicke*, in *Sheffield v. Lord Orrery*. 3 Atk. 268. But it was held by the court, that the first part of the devise to P. D. *prima facie* carried a fee, and was not restrained by any subsequent words; that the additional words. "leaving no issue behind him," necessarily imported, that the testator meant at the time of his son's death, and that it was not distinguishable from the case of *Pell v. Brown*; and therefore they were of opinion that the limitation over was good by way of executory devise. And Lord *Kenyon* seemed to doubt the soundness

ness of the distinction taken by Lord *Macclesfield* in the above-mentioned case of *Forth v. Chapman*. 3 Term Rep. 143. *Porter v. Bradley*. So where lands were devised to T. F. and to his heirs for ever; but in case he should depart this life and *leave no issue*, then to C. M. and S., or the survivor or survivors of them, to be equally divided betwixt them, share and share alike; Lord *Kenyon*, in delivering the opinion of the court, said, that it was a question of construction depending on the intention of the party; and that the question was, whether from the whole context of the will it could be collected, that when an estate was given to A. and his heirs for ever, but if he should die *and leave no issue*, then over, the testator meant dying *without issue living at the death of the first taker*? That on looking through the whole of the will the court had no doubt but that the testator meant, that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons, to whom it was given over, were then in existence, and *life estates* were only given to them; and taking that into consideration, it was impossible not to see that the failure of issue intended by the testator was to be a failure of issue at the death of the first taker. 7 Term Rep. 589. *Roe v. Jeffery*. So where a devise was to S. S., her heirs and assigns for ever; but if she happen to die *leaving no child or children lawful issue of her body living at the time of her death*, then to F. B. and his heirs; the court held that the devise in fee to S. S. was not restrained by the subsequent words to an estate-tail, but that the devise over to F. B. was a good

executory devise. 2 Bos. & Pull. 324. *Doe v. Wetton*.

One of the properties of executory devises is, that they cannot be aliened or barred by any mode of conveyance, whether by recovery, fine or otherwise; therefore until the contingency happens upon which the limitation is to take place, executory devises create a kind of perpetuity; for which reason the law has put them under some restraint, and circumscribed the bounds within which they are to be allowed.

At first it was held that the contingency must happen within the compass of a life, or lives in being, or a reasonable number of years after; at length it was extended a little further, namely, to a child in *ventre sa mere* at the time of his father's death, because, as that contingency must necessarily happen within the usual time of gestation, that construction would introduce no inconvenience: and the rule has in many instances been extended to 21 years after the death of a person in being, as in that case likewise there is no danger of a perpetuity. Willes's Rep 213. *Goodtitle v. Wood*. Therefore it is now become an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being and 21 years, and the fraction of another year, allowing for the time of gestation. 7 Term Rep. 102. *Long v. Blackall*. This rule was adopted in analogy to legal formal limitations, namely, for a life or lives in being with a remainder in tail to unborn children, who cannot bar it till 21; and the fraction of another year, since the statute of *William*, if tenant for life should leave his wife *ensient*.

ensient. 3 Term Rep. 146. *Porter v. Bradley.*

2. There is another species of executory devises, where a testator gives a future estate to arise upon a contingency, or at a certain time, and does not part with the fee, but retains it; and on his death the fee descends to his heir in the mean time. 1 Salk. 229, 230. As where a man devised to his wife till her son attained the age of 21, and then that his son should have the lands to him and his heirs; but if he died without issue before his said age, then to his daughter and her heirs, this was adjudged to be a good executory devise to the daughter, if the contingency happened, and that in the mean time the fee descended to the son as heir; but if he lived to 21, though he died after without issue; or if he left issue, though he died before 21, the daughter could not have the lands, because her brother was to die before 21 and without issue to intitle her to take. 3 Leon. 64. 70. *Hinde v. Lyons.* 2 Roll. Rep. 127. 217. *Boulton's case.* Palm. 132. S. C. 1 Eq. Caf. Abr. 188. So where a testator devises lands to A. in fee to commence six months after his decease, it is a good executory devise, and during those six months the estate descends and continues in the testator's heir at law. 1 Lutw. 798. *Clarke v. Smith.* S. C. cited 2 P. Will. 43. So where a man seised in fee devised to trustees for 500 years upon certain trusts, remainder to the first and other sons of his eldest son T., who was then a bachelor, successively in tail-male, remainder over; the limitation to the unborn son of T., was held good by way of executory devise; and

it was also held that the inheritance descended to T. till he had a son, or till his death without one. 2 P. Will. 28. *Gore v. Gore.* In this case it is to be observed, that the contingency, upon which the executory devise is limited to the first son of T., must in all events happen on the death of T., for it must take place either on the birth of a son to T., or on his death without having had any son. And where a man having only one sister and heir, who had issue A., and afterwards married W., by whom she had issue B. and M., devised lands to his sister until B. should attain 21, and after B. should have attained that age to B. and his heirs; and if B. should die before 21, then to the heirs of the body of W. and their heirs, as they should attain their respective ages of 21. The testator died; B. died before 21, living W. and afterwards W. died. It was adjudged that M. T. B. either as heir of B., or as heir of the body of W., being of age after the death of W., took the estate by way of executory devise. 2 Mod. 289. *Taylor v. Biddall.* There M. who was the heir of the body of W. could not take till the death of W., because *nemo est hæres viventis*; and as that heir of the body of W. who should attain 21 might not have been born before his father's death, and the estate could not vest in him till his age of 21, it is evident the estate might possibly not have vested under that limitation till 21 years after a period of a life then in being. So where a testator devised lands unto his grandson W. S. and his heirs; but in case W. S. should die before he should attain his age of 21 years, then to his grand-

grandson T. S., and if T. S. should die before he should attain his age of 21 years, then to such other son of the body of his daughter M. S. by his son-in-law T. S., as should happen to attain his age of 21 years in fee, and for default of such issue remainder over. The testator died leaving two grandsons, the said W. S. and T. S. who both died under age; afterwards another son A. of the body of M. S. by T. S. was born; it was held by the judges of the court of K. B. upon a case sent to them, and afterwards decreed by Lord *Talbot*, that it was a good executory devise to this after-born son A., if he should attain his age of 21 years; and the judges decided it upon the authority of the last mentioned case of *Taylor v. Biddall*; the record of which was searched and found to agree in the material parts of it with the printed reports. *Cas. temp. Talb. 228. Stephens v. Stephens*. In this case the limitation was confined to vest at the infant's age of 21, which must necessarily happen within 21 years after the death of its mother M. S. who was then in being. So where a devise was to the child with which the testator's wife was then *ensient*, in case it should be a son, during his life, and after his decease, then to such issue male, or the descendants of such issue male, of such child, as, at the time of his death, should be his heir at law; and in case, at the time of the death of such child, there should be no such issue male, nor any descendants of such issue male then living, or in case such child should not be a son, then to P. L. It was held that it was a good executory devise over to P. L. within the limits allowed by law with respect to executory devises;

for the devise over to P. L. must take effect, if at all, after a life which must be in being within nine months after the devisor's death. 7 Term Rep. 100. *Long v. Blackall*. This case, it is to be observed, begun with a devise to a posthumous child for life, with a limitation over, upon a failure of issue of his body at his death; which of course would include an heir male then in *ventre sa mere*; for as the devise begun with the allowance for the birth of a posthumous child, and also might conclude with it, the time might be claimed twice over; and so the time allowed for the birth of a posthumous child after lives in being and 21 years might be enlarged to two periods of gestation. And therefore in a late case, it was objected in argument, either that the effect of beginning an executory devise with the life of a person in the womb had escaped the attention of the court of king's bench; or if that court did take it into their consideration, and meant to say that the executory devise was nevertheless a valid one, then it was insisted, that the opinion of the judges in that case was questionable as having exceeded former determinations, because it added a further period to the boundary of executory devises, and the decision had the effect of taking the life of a person *en ventre sa mere* for a life in being; but that objection was overruled, and the case of *Long v. Blackall* was allowed and approved of to be a case of undoubted law. 4 Vez. jun. 254. 273. 323. 341.

But if an executory devise may not vest within the limits established by law for executory devises to take place, it is void. Thus an executory devise to take effect after an unborn son of A. should

should attain his age of 26 would be void. 3 Burr. 1416. *Lade v. Holford*. 1 Black. Rep. 428. Amb. 479. S. C. So where an advowson was devised to the *first or other son of B.* that should be bred a clergyman in holy orders in fee; but in case B. should have *no such son*; then to C. in fee, it was holden that both devises were void, as depending on too remote a contingency: therefore though B. dies without having had a son, the heir at law of the devisor, and not C. was intitled. 2 H. Black. 358. *Proctor v. Bishop of Bath and Wells*. 1 Black. Rep. 423. Amb. 479. S. C. So if it be to take effect after an indefinite failure of issue of any one, the limitation over is too remote and therefore void. As where an estate was agreed to be limited by marriage articles to S. M. for life, remainder to E. W. the testatrix's nephew in law for life, remainder to A. L. her niece (his wife) for life, remainder to their first and other sons successively in tail, remainder to their first and other daughters successively in tail, *with the reversion to the testatrix in fee*. Afterwards testatrix by her will, reciting that the estate was limited, or agreed to be limited, after her own death, and the death of her nephew in law and niece, *and in default of issue of their two bodies*, to herself in fee, devised the inheritance *to the heirs of the body of the niece A. L. by any other husband*, and for want of such issue to her nephew C. L. and the heirs of his body, remainder over; it was held that the first devise to the heirs of the body of the niece by any other husband was too remote, and of course the second was so too; and Lord Mansfield, in giving judgment, said, that the whole of the case was, whether

the testatrix intended by the devise *to give the heirs of the body of her niece A. L. by a second husband*, the remainder reversion, or estate, (whatever it be called) after the death of herself, E. W. and A. L. *and failure of issue* between them, or whether she meant to give an estate *in possession*, to the issue of A. L. by a second husband. And the court being clear that it was not an immediate devise, but a future one, to take place after an indefinite failure of issue between the said E. W. and her niece, held that the first devise *to the heirs of the body of the niece by any other husband* was void in its creation, as too remote, and therefore could not take effect as an executory devise. 2 Burr. 873. *Goodman v. Goodright*. 1 Black. Rep. 188. Doug. 507. note 3. S. C.

It has been held, in support of a testator's intent, that a limitation in a will which, in one event, would have operated as a contingent remainder, but which event did not happen, should operate as an executory devise, provided it falls within the established rule of law respecting executory devises. As where a devise was to S. son of J. for life, remainder to his first and other sons in tail-male, remainder to any other son or sons of the said J. who had no other son then born, remainder over. S. died in the life-time of the testator without issue, and afterwards the testator died; it was held by Lord Talbot that on the event which happened, namely, S.'s death in the testator's life time, it would best effectuate the testator's intent to construe the limitation over to the first and other sons of J., to be an executory devise, though if S. had survived the testator, they would

have operated as contingent remainders. Cal. temp. Talb. 44. *Hopkins v. Hopkins*. See *Brownsword v. Edwards*. 2 Vez. 249. S. P. So where a man, having a *reversion in fee* of certain premises expectant on the death of his eldest son T., who was tenant for life thereof, devised the same from and after his son's decease *to the heirs male of the body of the said son begotten* in lawful marriage, and in default of such issue, to the use and behoof of the testator's second, and other sons in tail-male, and for want of such issue to the testator's right heirs. The testator died leaving his said son T. and C. another son. Afterwards T. died unmarried, without ever having had issue, and C. survived him. It was held that the limitation over to the other son was a good executory devise to him, vesting in possession either on the death of T. without leaving issue male; or as a *remainder after an estate tail* on his death leaving issue male. And Lord Mansfield, in delivering the judgment of the court, said, that there were two ways in which the limitation to the second and other sons, in default of heirs-male of the body of T. might take effect. 1. If T. died leaving issue male, then the estate to the second son took effect immediately as a remainder expectant, which might be barred by a recovery. 2. Supposing the other alternative (which really happened) that T. had no son, then it was an executory devise to the second son, if T. at his death left no issue male, and that it was within the limits established by law to prevent perpetuities. That an obvious objection to the alternative in that case was, that, if the limitation over was a remainder,

it could not be turned into an executory devise: *That* was true, if it ever *vested* as a remainder; but in that case it might, or might not, upon a contingency, and it never did; and he cited the above-mentioned case of *Hopkins v. Hopkins*, and *Brownsword v. Edwards*. Doug. 487. *Doe v. Fonnereau*. It has been doubted whether this decision is not inconsistent with the before-mentioned case of *Goodman v. Goodright*, upon the authority of which it is said to be founded. There seems to be much weight in the reasoning of the counsel for the defendant in *Doe v. Fonnereau*, (Doug. 501.) namely, that the same argument which was used by the counsel for the plaintiff in that case, and afterwards adopted by Lord Mansfield in giving the judgment of the court, is applicable to the case of *Goodman v. Goodright*; in which it might be said, that either the niece A. L. must die without leaving issue, and then the nephew C. L.'s estate would vest at the death of a person in *esse*; or, if she had issue, the executory devise to the nephew C. L. would immediately *vest* as a remainder and might be barred when the issue came of age. There seems to have been no danger of a perpetuity in the case of *Goodman v. Goodright*. The death of the niece A. L. determined the suspension of the vesting of the estate. If she had had issue by E. W. her then husband, such issue, being tenants in tail, might by a recovery have barred the aunt's reversion, and consequently her devisees of the reversion: If the niece had had issue by any other husband, such issue at the age of twenty-one might have barred all the remainders over. And if she died, as the fact was,

without

without issue, the devise of the reversion by A. W. took effect in C. L. the devisee in remainder, the prior estate in contingency never having taken effect.

With regard to executory devises it is a rule, that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken. However it seems to be established, that whenever the first limitation vests in *possession*, those that follow vest in *interest* at the same time, and cease to be executory, and become mere vested remainders and subject to all the incidents of remainders, as appears by the before-mentioned cases of *Stephens v. Stephens*, *Hopkins v. Hopkins*, and *Doe v. Fonnereau*.

3. A third sort of executory devises or rather *bequests* is, where a *term for years* or other *personal estate* is bequeathed to one for life, remainder over to another, the remainder shall take effect as an executory bequest. At common law, if a man had granted by deed a term of years to A. for life, remainder over to B., A. had the whole term in him; and therefore no remainder could be limited after it. But when long and beneficial terms came in use, the convenience of families required that they might be settled upon a child, after the death of the parent. Such limitations were soon allowed to be created *by will*; and the old objections were removed by changing the name from *remainders*, to *executory bequests*. And it makes no difference whether the *term*, or the *lease*, or the *farm*, or the *use and occupation*, or the *profits* of the lands, or the *lands themselves* are bequeathed. 8 Rep. 94. b. 95. a. *Matthew Manning's case*. Cro. Jac. 198.

Mallet v. Sackford. 1 Roil. Abr. 610. (K.) pl. 5. 10 Rep. 46. b. *Lampet's case*. 1 Burr. 284. *Wright v. Cartwright*. The same reason required that such limitations might be created by deed; as, for instance, marriage settlements, to answer the agreement of the parties and the exigencies of families; therefore, to get out of the literal authority of the old cases, an ingenious distinction was invented; a remainder might be limited for the residue of the *years*, but not for the residue of the *term*. 1 Burr. 284. However, in this last case, it was adjudged that where a demise was made by deed to C. for 99 years, if he should so long live, and after his death or other determination of the said *term*, remainder to R. for the residue of the said *term*, the remainder to R. was good, and he should have it during the residue of the years to come; and the old distinction, between the residue of the *years*, and the residue of the *term*, was over-ruled. So a bequest of household goods, after a prior gift for life, and without limiting the *use* merely to the first legatee, is valid. 1 P. W. 1. *Hyde v. Parratt*. However where a term for years was bequeathed to D. for life, and after to W. and his assigns, and if he died without issue *living at the time of his death*, then to T., the limitation over to T. was adjudged to be void, as tending to a perpetuity. Cro. Jac. 459. *Child v. Baylie*. 3 Leon. 22, 23. *Gibbons v. Summers*. S. P. But that case was denied by Lord Nottingham in the Duke of Norfolk's case, 3 Chan. Caf. 1. Pollex. 223. 1 Eq. Caf. Ab. 192. where A. having issue several sons created a term for years, and by another deed declared

the trust thereof to his second son and the heirs-male of his body, remainder to his other sons; provided, that if his eldest son died without issue, or not leaving his wife enſient with a child, *living the second son*, ſo that the earldom of A. deſcended on the ſecond ſon, then the ſaid term to remain to the third ſon and the heirs-males of his body, with like limitations to the other ſons; the eldeſt ſon died without iſſue, *living the ſecond ſon*; and this limitation to the third ſon was held good, and ſo decreed by Lord *Nottingham* contrary to the opinion of the three judges who aſſiſted him. This decree was afterwards reverſed by Lord Keeper *Nor. b.* but upon an appeal to the Houſe of Lords, the laſt decree was reverſed, and Lord *Nottingham's* eſtabliſhed. The caſe of *Child v. Baylie* was alſo denied by the court in *Lambe v. Archer*. 1 Salk. 225. where a term was bequeathed to A. and the heirs of his body, and if A. died without iſſue *living B.* then to B., it was held that the limitation over to B. was good, the contingency being to happen within the compaſs of a life. See alſo 1 Eq. Caſ. Abr. 153. *Fletcher's* caſe.

Terms for years or perſonal eſtate cannot, properly ſpeaking, be entailed. A bequeſt of a term to A. and the heirs-male of his body, and for default of ſuch iſſue to B. and the heirs-male of his body, veſts the whole eſtate and intereſt in A. 1 Roll. Abr. 611. (J.) pl. 1. *Leventhorpe v. Aſſbie*. So the limitation of perſonal eſtate to one in tail veſts the whole in him. 1 P. Will. 290. *Scale v. Seale*. 1 Vez. 133. 154. *Butterfield v. Butterfield*. 3 Bro. P. C.

257. *Stratton v. Payne*. 6 Bro. P. C. 450. *Earl of Chatham v. Tothill*.

It is an eſtabliſhed principle that the limitation over of a term after a general failure of iſſue is void, as being too remote. 2 Atk. 312. 376. *Saltern v. Saltern*. If however the teſtator makes uſe of words in his will which indicate an intention to confine the generality of the expreſſion of *dying without iſſue*, to dying without iſſue *living at the time of the perſon's deceaſe*, they will be ſo conſtrued to effectuate the intent. As where a term was bequeathed to H. for life, and no longer. and after his deceaſe to ſuch of the iſſue of the ſaid H. as H. ſhould by will appoint, and in caſe H. ſhould die without iſſue then over to A.; H. died without iſſue living at his death; thoſe words upon the whole of the will were conſtrued to mean iſſue living at his death; becauſe it was to be intended ſuch iſſue as A. ſhould or might appoint the term to, namely, iſſue *then living*. 1 P. Will. 432. *Target v. Gaunt*. So where a teſtator gave the reſidue of his real and perſonal eſtate to his nephews W. and G., and if either of them ſhould depart this life, and *leave no iſſue of* their reſpective bodies, then he gave the ſaid premises to D., Lord Chancellor *Parker* obſerving that the deviſe carried a freehold as well as a leaſehold, nevertheless, thought it might be reaſonable enough to take the ſame word in two different ſenſes as to the two different eſtates; and that as to the freehold, the conſtruction ſhould be, if W. or G. died without iſſue *generally*, and as to the leaſehold, the ſame words might be conſtrued to mean a dying without *leaving*

leaving issue at their death. 1 P. Will. 667. *Forth v. Chapman.* So where a term was bequeathed to T. son of D. and S. and the heirs lawful of him for ever; but in case he should happen to die and leave no lawful heir, then and in that case he gave them after the death of the said T. to the next eldest son or heir of the said D. and S. T. died without issue. The court were clearly of opinion on the authority of the last cited case of *Forth v. Chapman*, which had been uniformly followed by a series of cases down to that time, that the limitation over was good; for it was equivalent to leaving no issue at the time of his death, 2 Term Rep. 720. *Goodtitle v. Pegden.* See also 1 P. Will. 198. *Nichols v. Hooper.* Ibid. 563. *Pinbury v. Elkin.* Ibid. 534. *Hughes v. Sayer.* Ibid. 748. *Pleydell v. Pleydell.* 2 P. Will. 421. *Maddox v. Staines.* 3 P. Will. 258. *Atkinson v. Hutchinson.* Cowp. 410, 411. *Denn v. Shenton per Lord Mansfield.*

But though in these last cited cases it was held, that the words, "if the legatee shall die without issue," then over, in bequests of personal property, *ex vi termini*, and of themselves, signified a dying without issue *living at the death* of the first taker, yet the more modern cases agree that they are not to be so understood, but on the contrary they shall be intended to mean an *indefinite failure of issue*, unless the contrary appear from other circumstances in the will. 2 Atk. 313, 314. *Beauclerk v. Dormer.* Ibid. 376. *Saltern v. Saltern.* 2 Vez. 181. *Earl of Stafford v. Buckley.* 1 Bro. C. C. 190. *Bigge v. Bensley.*

The same analogy is maintained between real and personal estates, in re-

gard to the possible suspension of the power of alienation of 21 years after the birth of an unborn son: and there is no difference whether the limitation of a term for years is by will or deed of trust.

It seems now to be established, notwithstanding some old opinions to the contrary, that contingent and executory estates and possibilities, accompanied with an interest, are descendible to the heir, or transmissible to the representative of a person dying, or may be granted, assigned or devised by him, before the contingency, upon which they depend, take effect. Willes's Rep. 211. *Goodtitle v. Wood.* 2 Burr. 1131. *Selwyn v. Selwyn.* S. C. 1 Black. Rep. 251. 2 Will. 29. *Goodright v. Searle.* 1 Black. Rep. 605. *Roe v. Griffiths, Moor v. Hawkins* before Lord Northington, cited in 1 H. Black. 30. *Roe v. Jones*, and 3 Term Rep. 88. Where *Roe v. Jones* was affirmed in K. B. on error. Cal. temp. Talb. 117. *King v. Withers.*

It was enacted by statute 39 and 40 Geo. 3. c. 98. that no person shall by any deed, surrender, will, codicil, or otherwise settle or dispose of any real or personal property, so that the rents, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life of such grantor or settlor, or the term of 21 years from the death of such grantor, settlor, devisor, or testator, or during the minority of any person who shall be living, or in *ventre sa mere*, at the time of the death of such grantor, devisor, or testator, or during the minority only of any person who, under the trusts of the deed, surrender, will, or other assurance directing

directing such accumulation, would for the time being, if of full age, be intitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of that act, go to and be received by such

person as would have been entitled thereto, if such accumulation had not been directed. Provided that the act shall not extend to any provision for the payment of debts, or for raising portions for children, or to any direction touching the produce of timber.

(10) See 3 Burr. 1618. *Throgmorton v. Holyday*. 5 Term Rep. 558. 1 Bos. & Pull. 558. *Denn v. Mellor*. 2 Bos. & Pull. 247. S. C. Com. Dig. *Devise*. (N. 4.) Willes's Rep. 143. *Moone v. Heafeman*. 9 East. 1. *Robinson v. Grey*. Ibid. 400. *Doe v. Cundall*.

DE

Term. Sanct. Mich.

Anno Regni Regis, Car. II. 22.

Dominus Rex *versus* Perin.

Case 63.

Mich. 23 Car. 2. Regis. Rot. 8.

SOMERSETSHIRE, to wit. Our lord the king has sent to his justices assigned to deliver his gaol in the county aforesaid of prisoners being in the same, and to the keepers of his peace in the said county, and also to his justices assigned to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county, and to every of them, his writ close in these words, to wit; *Charles* the second by the grace of God, of *England, Scotland, France and Ireland* king, defender of the faith &c. to our justices assigned to deliver our goal in the county of *Somerset* of prisoners being in the same, and to the keepers of our peace in the said county, and also to our justices assigned to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county, and to every of them, greeting: Because in the record and proceedings, and also in the giving of judgment, in a certain presentment made against *Matthew Perin*, late of *Taunton* in the county aforesaid, husbandman, at the assizes and general gaol delivery of the aforesaid county of *Somerset*, holden for the county aforesaid, at the castle of *Taunton* in the said county, on *Monday*, to wit, the 24th day of *August* in the 15th year of our reign, before Sir *Robert Fester* knt., then our chief-justice assigned to hold pleas before

Error from the
justices of gaol
delivery to the
king's bench.

us,

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us, and *John Archer* then serjeant at law, now knt., one of our justices of the bench, then our justices assigned to take the assizes in the county aforesaid, for a certain trespass and contempt in obstinately refusing and denying to take and pronounce the oath of allegiance, mentioned and expressed in a certain act lately made and provided in the parliament of our lord *James*, late king of *England* &c., begun and holden at *Westminster* in the county of *Middlesex*, on the 19th day of *March* in the first year of his reign of *England*, and of *Scotland* the 37th, and holden by prorogation at *Westminster* aforesaid in the said county of *Middlesex*, on the 5th day of *November* in the 3d year of his reign of *England*, *France* and *Ireland*, and of *Scotland* the 39th, intituled an act for the better discovering and repressing of popish recusants, offered by the said *Robert* and *John* our justices aforesaid to the said *Matthew*, against the form of the statute in such case lately made and provided, whereof the said *Matthew* was accused before the said *Robert* and *John* our justices aforesaid, and was thereupon convicted thereof by a certain jury of the country taken between us and the said *Matthew*, as it is said, manifest error hath intervened to the great damage of the said *Matthew*, as by his complaint we are informed; We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the said *Matthew* in this behalf, do command you, that if judgment be thereupon given, then you send to us distinctly and openly, under your seals, or the seal of one of you, the record and proceedings aforesaid, with all things concerning the same, and this writ, so that we may have them in three weeks from the day of *St. Michael* wheresoever we shall then be in *England*; that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of our realm of *England*, ought to be done. Witness ourself at *Westminster* the 31st day of *August* in the 23d year of our reign.

Return of the
 writ.

The record and proceedings of which mention is made in the said writ follow in these words; the answer of Sir *John Vaughan* knt., chief-justice of our said lord the king of the bench,

bench, one of the justices &c. The execution of this writ appears in a certain schedule to this writ annexed.

Somerſeſhire, to wit. Be it remembered, that at the general gaol delivery of our lord the king of his county of *Somerſet* holden at the caſtle of *Taunton* in and for the ſaid county, on *Monday*, to wit, the 24th day of *Auguſt* in the 15th year of the reign of our lord *Charles* the ſecond, by the grace of God, of *England, Scotland, France and Ireland*, king, defender of the faith &c., before Sir *Robert Foſter* knt. chief-juſtice of our ſaid lord the king aſſigned to hold pleas before the king himſelf, and *John Archer* ſerjeant at law, juſtices of our ſaid lord the king aſſigned to deliver his gaol in his ſaid county of *Somerſet* of the priſoners being in the ſame, and to keep the peace in the ſaid county of *Somerſet*, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors committed in the ſame county, by the oath of twelve jurors, good and lawful men of the ſaid county of *Somerſet*, impanelled, ſworn and charged to inquire for our ſaid lord the king, and for the body of the ſaid county, it is preſented, (b) That at the aſſizes and general gaol delivery of our lord the king of his county of *Somerſet* holden for the ſaid county at the caſtle of *Taunton* in the ſaid county, on *Monday*, to wit, the 24th day of *Auguſt* in the 15th year of the reign of our lord *Charles* the ſecond, by the grace of God, of *England, Scotland, France and Ireland*, king, defender of the faith &c. before Sir *Robert Foſter* knt. chief-juſtice of our ſaid lord the king aſſigned to hold pleas before the king himſelf, and *John Archer* ſerjeant at law, juſtices of our ſaid lord the king aſſigned to take the aſſizes in the ſaid county, the ſaid juſtices tendered the oath of allegiance mentioned and expreſſed in a certain act lately made and provided in the parliament of the lord *James* late king of *England*, begun and holden at *Westminſter* in the county of *Middleſex*, on the 19th day of *March* in the firſt year of his reign of *England &c.*, and of *Scotland* the 37th, and holden by prorogation at *Westminſter* aforeſaid in the county of *Middleſex* aforeſaid, on the 5th day of *November* in the 3d year of his reign of *England, France, and Ireland*, and of *Scotland* the 39th, intituled an act for the better diſcovering and repreſſing of popiſh recusants, to one *John Cary* of

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The record.

(b) See 1 Saund.
308. Rex. v.
Kildeby, note

(2).

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Indictment.

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of *Abord* in the county aforesaid husbandman, one *Giles Brooke* of *Mudford* in the county aforesaid labourer, one *Henry Turner* of *Milverton* in the said county weaver, one *Joseph Pearse* of the same taylor, one *Henry Lambert* of *Glasstonbury* in the said county taylor, and *Matthew Perin* late of *Taunton* in the county aforesaid, husbandman, then being, and each of them then being, of the age of 18 years, to be taken and pronounced upon the holy gospels of God in the aforesaid open assizes, and caused the said oath to be read to them, and to every of them, and requested the said *John Cary*, *Giles Brook*, *Henry Turner*, *Joseph Pearse*, *Henry Lambert*, and *Matthew Perin* to take the said oath then and there in the open assizes aforesaid: yet the said *John Cary*, *Giles Brook*, *Henry Turner*, *Joseph Pearse*, *Henry Lambert*, and *Matthew Perin* then and there obstinately and absolutely refused and denied to take and pronounce the said oath so as aforesaid then and there tendered by the said justices in form aforesaid in the open assizes aforesaid to them and every of them, and each of them then and there obstinately and absolutely refused and denied to take the same oath, against the peace of our said lord the now king, his crown and dignity, and also against the form of the statute in such case made and provided. And afterwards, to wit, on the 24th day of *August* in the 15th year aforesaid, at the said general goal-delivery of our said lord the king of the county aforesaid, holden at the said castle of *Taunton* in the county aforesaid, before the said Sir *Robert Foster* and *John Archer* the justices aforesaid, the said *Matthew Perin* was brought here to the bar in his own proper person by Sir *John Ware* knt. then sheriff of the said county, and being immediately asked concerning the premises above laid to his charge how he will acquit himself thereof, says that he is not guilty thereof, and of this he puts himself upon the country; and *William Swanton* esq. clerk of the assizes of the said county, who prosecutes for our said lord the king in this behalf, likewise &c.: whereupon the sheriff of the said county of *Somerset* was commanded that he cause to come immediately before the said justices &c., twelve &c., of the neighbourhood of *Taunton* aforesaid in the county aforesaid, and who neither &c., to recognise &c., because as well &c.

Defendant pleads
 not guilty.

and issuethereon.

Venire awarded.

And

And thereupon R. W., J. C., J. P., W. B., G. B., T. J., J. H., W. B., H. C., J. S., J. R., and W. W., jurors by the said sheriff impanelled, being called then come, who being chosen, tried and sworn to speak the truth of the premises, say upon their oath that the said *Matthew Perin* is guilty of the premises in the said indictment above laid to his charge in manner and form as by the said indictment is above supposed against him; whereupon all and singular the premises being seen and by the court here understood, it is considered by the said court that the said *Matthew Perin* by reason of the premises in the said indictment laid to his charge, according to the form of the statute in such case made and provided, be out of the protection of our said lord the king, and forfeit his lands and tenements, goods and chattels, and that his body remain in prison at the will of our said lord the king, and that he be taken &c. Afterwards, to wit, on *Saturday* in the feast of *St. Martin* in this same term, before our lord the king at *Westminster* comes the said *Matthew Perin* in his proper person under the custody of the sheriff of the said county of *Somerset*, by virtue of the writ of our lord the king of *habeas corpus ad subjiciendum* &c. to him thereof directed, who is committed to the marshal &c., and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears, that immediately after the said issue joined between the said *William Swanton* then clerk of the assizes of the said county of *Somerset*, who then prosecuted for our said lord the king in that behalf, and the said *Matthew Perin* and others defendants, the writ of *venire facias* was awarded in these words, to wit, "therefore the sheriff of the said county of *Somerset* was commanded that he cause to come twelve &c.," whereas it ought to have been, "the sheriff of the said county of *Somerset* is commanded that he cause to come twelve &c.," and therefore in that there is manifest error; wherefore he prays judgment, and that the judgment aforesaid for the error aforesaid, and other errors found and being in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to the common law of this realm of

. *England*,

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Defendant found
guilty.

Judgment of
premunire.

Assignment of
error.

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England, and to all things which he has lost by occasion of the said judgment, and that the court here may proceed to examine the record and proceedings aforesaid. And because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises, a day thereof is given to the said *Matthew Perin* in the state which he now &c., until the morrow of St. *Martin* before our said lord the king wheresoever &c., to hear their judgment thereof &c.

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At which said morrow of St. *Martin* in this same term before our said lord the king at *Westminster*, comes the said *Matthew Perin* in his proper person under the custody of the said marshal, and as before prays judgment, and that the judgment aforesaid for the error aforesaid, and other errors found and being in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to the common law of this realm of *England*, and to all things which he hath lost by occasion of the said judgment, and that he may be dismissed and discharged by the court from the said judgment; whereupon all and singular the premises being seen and by the court here understood, it is considered that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid found and being, be reversed, annulled, and altogether held for nothing; and that the said *Matthew Perin* be restored to the common law of this realm of *England*, and to all things which he hath lost by occasion of the said judgment, and that the said *Matthew Perin* go thereof without day &c.

Dominus Rex *versus* Perin.

Mich. 22 Car. 2. Regis. Rot. 367.

Case 63.

S. C. 1 Vent.
270. 2 Keb. 846.
If in the award
of the venire fa-
cias it is said,
whereupon the
sheriff was, in-
stead of is, com-

ERROR to reverse a judgment in a præmunire given by the justices of assize and gaol delivery in the county of *Somerset* against *Perin*, for refusing to take the oath of allegiance mentioned in the statute 3 Jac. 1. c. 4. *Perin* pleaded not guilty

guilty to the indictment, and issue was joined between him and the clerk of assize; and the award of the *venire facias* was in this manner on the record certified, namely, “whereupon the sheriff of the said county of *Somerset* was commanded that he cause to come &c.,” whereas it ought to have been *is* commanded, and not *was* commanded in the preterperfect tense. For it is rather a history of a matter which was done before the issue joined, than the record of the court of an act done by the court *in presenti*, which ought always to be recorded in the present tense. And for this error the judgment was (1) reversed and the party restored. *Saunders* of counsel with *Perin*.—*Note*; For the same fault a similar judgment in *præmunire* against one *Dixon* was reversed in *Trinity* last.

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(1) Per *Hale* chief justice, the acts of a court ought to be in the present tense; as “*præceptum est*,” not “*præceptum fuit* :” but the acts of the party may be in the preterperfect tense, as

“*venit et protulit hic in curiâ quandam querelam suam* :” and the continuances are in the preterperfect tense; as “*venerunt*,” not “*veniunt*.” 1 Mod. 81. *Hall v. Clarke*.

D E

Termino Paschæ.

Anno Regni Regis Car. II. 24.

Smith & al' *versus* Martin.

Case 64.

Hil. 23 & 24 Car. II. Regis. Rot. 545.

Writ of error
from the county-
palatine of Dur-
ham to the K. B.

OUR lord the king has sent to his justices itinerant, and other justices in his county palatine of *Durham* and *Sad-berg*, his writ close in these words, to wit: *Charles* the second, by the grace of God, of *England, Scotland, France* and *Ireland*, king, defender of the faith &c., to our justices itinerant, and our other justices in our county palatine of *Durham* and *Sad-berg*, and to every of them, greeting: Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court holden at *Durham* before you or some of you, by our writ, between *Samuel Martin*, clerk, and *Robert Smith* gent. and *Anne* his wife, *Nicholas Palmer* mason, *John Baraclugh* labourer, and *Thomas Palmer* mason, *Richard Browne* labourer, *Robert Younge* labourer, and *George Jurdison* labourer, of a certain trespass on the case done to the said *Samuel*, by the said *Robert, Anne, Nicholas, John, Thomas, Richard, Robert* and *George*, as it is said, manifest error hath intervened, to the great damage of the said *Robert, Anne, Nicholas, John, Thomas, Richard, Robert*, and *George*, as by their complaint we are informed: We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given,

given, then you send to us distinctly and openly, under your seals, or the seal of one of you, the record and proceedings aforesaid, with all things concerning the same, and this writ, so that we may have them in 15 days of St. *Martin* where-soever we shall then be in *England*; that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right, and according to the law and custom of our realm of *England*, ought to be done. Witness ourself at *Westminster* the 8th day of *August* in the 23d year of our reign. *Norbury.*

SMITH & al^o
v. MARTIN.

The answer of our said lord the king's justices itinerant in the county palatine of *Durham* and *Sadberg* &c., to this writ &c. *Return.*

The record and proceedings in the plaint whereof mention is within made, with all things concerning the same, we send before our lord the king wheresoever &c., on the day within contained as within we are commanded.

Milo Stapylton, William Belafys.

The record and proceedings, of which mention is made in the writ annexed to this record, with all things concerning the same, follow in these words :

Durham, to wit. Pleas at *Durham* in the county of *Durham* before *William Belafys* esq. and *Milo Stapylton* esq. and their companions, justices itinerant of our lord the king in the county of *Durham* and *Sadberg*, of the session or court of pleas holden at *Durham*, on the 19th day of *June* in the 23d year of the reign of our lord *Charles* the second, by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith &c. *Durham*, to wit; *Samuel Martin* clerk offered himself against *Robert Smith* late of the city of *Durham* in the county aforesaid gent. and *Anne* his wife, *Nicholas Palmer* late of *Elvett* in the county aforesaid mason, *John Barraclugh* late of *Elvett* in the said county labourer, *Thomas Palmer* late of *Elvett* in the county aforesaid mason, *Richard Browne* late of *Elvett* in the said county labourer, *Robert Younge* late of *Elvett* in the county aforesaid labourer, *George Jurdison* late of *Elvett* in the county aforesaid labourer, *John Taylor* late of *Elvett* in the county aforesaid labourer, and

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John Bellamy late of *Elvett* in the county aforesaid mason, in a plea wherefore whereas the said *Samuel*, on the 29th day of *November* in the 22d year of the reign of our lord *Charles* the second now king of *England* &c., was seised of and in a dwelling-house with the appurtenances in the city of *Durham* in the county aforesaid, whereof a house called the *Garden-house*, otherwise, the *House on the Wall*, and a garden then were parcel, in his demesne as of fee; and being so seised thereof the said *Robert Smith*, *Anne*, *Nicholas*, *John Barraclugh*, *Thomas*, *Richard*, *Robert Younge*, *George*, *John Taylor* and *John Bellamy*, well knowing the premises, but maliciously contriving and intending to hinder and deprive him the said *Samuel* from the profit and advantage of his house called the *Garden-house*, otherwise, the *House on the Wall*, and garden, and unjustly to aggrieve the said *Samuel*, on the said 29th day of *November* in the 22d year aforesaid, did dig stones in a certain piece of land called the *Bank*, otherwise, the *Mote side*, in the said city of *Durham*, so near the said house called the *Garden-house*, otherwise, the *House on the Wall*, and garden, that the said house and 300 perches of a stone-wall inclosing the said garden afterwards, to wit, on the first day of *December* in the 22d year aforesaid, entirely tumbled down and fell down upon the ground in the said piece of ground so dug, to the damage of the said *Samuel* of 100l.

And the said *Robert Smith* and *Anne*, *Nicholas*, *John Barraclugh*, *Thomas*, *Richard*, *Robert Younge* *George*, *John Taylor* and *John Bellamy* did not come, therefore the sheriff of *Durham* aforesaid is commanded that he attach them &c. And the sheriff now returns that they have nothing &c., therefore let them be taken &c.; whereupon the said sheriff is commanded that he take them if &c., so that they be here before the justices itinerant of our said lord the king on the 30th day of *June* instant &c. At which day here, before *William Bestys* esq. *Milo Stapylton* esq. and their companions, justices itinerant of our said lord the king in the county of *Durham* and *Sadberg*, at the session or court of pleas holden here on the same 30th day of *June* in the 23d year aforesaid, came as well the said *Samuel Martin* as the said *Robert Smith* and *Anne*, *Nicholas*, *John Barraclugh*, *Thomas*, *Richard*, *Robert Younge*

Younge and George in their proper persons, and the said *John Taylor* and *John Bellamy* did not come; and thereupon the said *Samuel* found pledges to prosecute the said plea, to wit, *John Doe* and *Richard Roe*, and then likewise the said *Samuel* put in his place *Cuthbert Harvdon* against the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* who appeared in the plea aforesaid, &c. And the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* put in their place *Francis Crosby* against the said *Samuel*, in the plea aforesaid &c.

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Durham, to wit. *Robert Smith* late of the city of *Durham* in the said county gent. and *Anne* his wife, *Nicholas Palmer* late of *Elvett* in the said county mason, *John Barraclugh* late of *Elvett* in the said county labourer, *Thomas Palmer* late of *Elvett* in the said county mason, *Richard Browne* late of *Elvett*, in the said county labourer, *Robert Younge* late of *Elvett* in the said county labourer, and *George Jurdison* late of *Elvett* in the said county labourer, were attached to answer *Samuel Martin* clerk in a plea wherefore whereas the said *Samuel*, on the 29th day of *November* in the 22d year of the reign of our lord *Charles* the second now king of *England*, was seised of and in a dwelling-house with the appurtenances in the city of *Durham* in the said county, whereof a house called the *Garden-house*, otherwise, the *House on the Wall*, and a garden then were parcel, in his demesne as of fee; and being so seised thereof the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George*, together with the said *John Taylor* late of *Elvett* in the said county labourer, and *John Bellamy* late of *Elvett* in the (1) county aforesaid

Declaration.

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(1) Formerly a distinction was taken between declaring, that the defendant together with *divers other person* to the plaintiff *unknown*, and the defendant together with *A. B. and C. D. by name*, committed the act complained of: the declaration was held to be proper in

the former, but insufficient in the latter case; though the defect, being matter of form, and not of substance, was aided after verdict by the statute 18 Eliz. c. 14. : it being a rule, that if the plaintiff will himself discover to the court any thing whereby it appears that he had no cause

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aforesaid mason, well knowing the premises, but maliciously contriving and intending to hinder and deprive the said *Samuel* of the profit and advantage of his said house called the *Garden-house*, otherwise, the *House on the Wall*, and garden, and unjustly to aggrieve the said *Samuel*, on the said 29th day of *November* in the 22d year aforesaid, did dig stones in a certain piece of ground called the *Bank*, otherwise, the *Mote-side*, in the said city of *Durham*, so near to the said house called the *Garden-house*, otherwise, the *House on the Wall*, and the said garden, that the said house and 300 perches of a stone-wall inclosing the said garden afterwards, to wit, on the first day of *December* in the 22d year aforesaid, entirely tumbled down and fell down upon the ground in the said piece of land so dug, to the damage of the said *Samuel* of 100l. And whereupon the said *Samuel* by *Cuthbert Hawdon* his attorney complains, that whereas he the said *Samuel*, on the 29th day of *November* in the 22d year of the reign of our lord *Charles* the 2d now king of *England &c.*, was seised of and in a dwelling house with the appurtenances in the city of *Durham* in the said county, whereof a house called the *Garden-house*, otherwise, the *House on the Wall*, and a garden, then were parcel, in his demesne as of fee; and being so

cause of action when he commenced it, or though he had a cause of action, that it ought to have been brought in a different manner from that in which it is brought, the action will abate; and therefore, if four commit a trespass, and the plaintiff brings his action against one only, and declares that he with the other three committed the trespass, his action will abate; but if the defendant pleads that he with others committed the trespass, and the plaintiff released the others, and the plaintiff deny the release, whereby he does in a manner confess that the others were joint trespassers, yet the action shall not abate; for there the matter does not appear by the plaintiff's own shewing, but by the

defendant's plea 1 Leon. 41. *Henly v. Broad.* 3 Leon. 77. S. C. Hob. 199. *Brickhead v. Archbishop of York.* 1 Rol. Rep. 176. But in a late case, where in trespass for running down a ship, it was alleged in one count of the declaration, that the plaintiff was only a part owner, namely, of one fourth of the ship, after verdict this matter was moved in arrest of judgment; but the court held, that, notwithstanding the defect appeared on the declaration, the defendant ought to have pleaded it in abatement, and could not take advantage of it in any other way. 6 Term Rep. 766. *Addison v. Overend.* 1 Salk. 32. *Child v. Sands.* See 1 Saund. 291. a. note 4. *Cabell v. Vaughan.*

seised thereof the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* together with the said *John Taylor* late of *Elvett* in the said county labourer, and *John Bellamy* late of *Elvett* in the county aforesaid mason, well knowing the premises, but maliciously contriving and intending to hinder and deprive the said *Samuel* of the profit and advantage of his said house, called the *Garden-house*, otherwise the *House on the Wall*, and garden, and unjustly to aggrieve the said *Samuel*, on the said 29th day of *November* in the 22d year aforesaid, did dig stones in a certain piece of ground called the *Bank*, otherwise, the *Mote-side*, in the said city of *Durham*, so near to the said house called the *Garden-house*, otherwise, the *House on the Wall*, and the said garden, that the said house and 300 perches of a stone-wall inclosing the said garden afterwards, to wit, on the first day of *December* in the 22d year aforesaid, entirely tumbled down and fell down upon the ground in the said piece of land so dug; wherefore he says he is injured and has damage to the value of 100l. And therefore he brings suit &c.

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And the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* by *Francis Crosby* their attorney, come and defend the wrong and injury when &c., and pray leave to imparl thereto here until the 15th day of *July* next coming, and they have it &c., the same day is given to the said *Samuel* here &c. At which day here came the parties aforesaid &c. and thereupon the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* pray further leave to imparl here until the 1st day of *August* next coming, and they have it &c., the same day is given to the said *Samuel* here &c. At which day here came as well the said *Samuel*, as the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* by their attornies aforesaid, and thereupon the said *Samuel* prays that the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* may answer his said declaration &c., and the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George*, as before,

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Not guilty.

defend the wrong and injury when &c. and say that they are not guilty of the premises above laid to their charge in manner and form as the said *Samuel* above complains against them, and of this they put themselves upon the country, and the said *Samuel* likewise. Therefore the sheriff is commanded that he cause to come here on *Thursday* the 17th day of *August* instant, at eight o'clock in the forenoon of the same day, twelve &c., of the neighbourhood of the city of *Durham* &c. by whom &c., and who neither &c. to recognise &c., because as well &c. the same day and hour are given to the parties aforesaid here &c. At which said and hour here came as well the said *Samuel* as the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* by their attorneys aforesaid, and the sheriff, to wit, *Sir Gilbert Gerrard* kut. and bart. now returns here the said writ of *venire facias*, together with a panel of the names of the jurors annexed to the same in all things served and executed. And the jurors thereon impanelled being called likewise come, who, to speak the truth of the premises being chosen, tried and sworn, say upon their oath that the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* are, and each of them is, guilty of the premises above laid to their charge in manner and form as the said *Samuel* above complains against him; and they assess the damages of the said *Samuel* on occasion of the premises, besides his costs and charges by him about his suit in this behalf expended, to 13l. 6s. 8d. and for those costs and charges to 40s. Therefore it is considered by the court that the said *Samuel* do recover against the said *Robert Smith* and *Anne, Nicholas, John Barraclugh, Thomas, Richard, Robert Younge* and *George* his said damages to 15l. 6s. 8d. by the jurors aforesaid in form aforesaid assessed, and also 9l. 12s. and 2d. for his said costs and charges, by the court of our said lord the king here adjudged of increase to the said *Samuel*, at his request; which said damages in the whole amount to 24l. 18s. and 10d., and the said *Robert Smith* and *Anne, Nicholas, Thomas, Richard, Robert Younge* and *George* in mercy &c.

Verdict for the
plaintiff.

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Judgment.

Assignment of
general errors.

Afterwards, to wit, on *Tuesday* next after the octave of *St. Hilary* in the 23d year of the reign of our lord *Charles* the

second

second now king of *England* &c. before our lord the king at *Westminster*, came the said *Robert Smith* and *Anne* his wife, *Nicholas Palmer*, *John Barraclough*, *Thomas Palmer*, *Richard Browne*, *Robert Younge* and *George Furdison* in their proper persons, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matter in the same contained, are not sufficient in law for the said *Samuel Martin* to have or maintain his said action thereof against the said *Robert Smith* and *Anne*, *Nicholas*, *John*, *Thomas*, *Richard*, *Robert Younge* and *George*, therefore in that there is manifest error: there is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said *Samuel Martin* against the said *Robert Smith* and *Anne*, *Nicholas*, *John*, *Thomas*, *Richard*, *Robert Younge* and *George*, whereas by the law of this realm of *England*, the said judgment ought to have been given for the said *Robert Smith* and *Anne*, *Nicholas*, *John*, *Thomas*, *Richard*, *Robert Younge* and *George* against the said *Samuel*; therefore in that there is manifest error. And the said *Robert Smith* and *Anne*, *Nicholas*, *John*, *Thomas*, *Richard*, *Robert Younge* and *George* pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, and that the said *Samuel* may rejoin to the said errors, and that the court of our said lord the king here may proceed to examine as well the record and proceedings aforesaid as the errors aforesaid &c. And the said *Samuel* by *Seth Powell* his attorney comes and says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court of our said lord the king here may proceed to examine as well the record and proceedings aforesaid, as the said matters by the said *Robert Smith* and *Anne*, *Nicholas*, *John*, *Thomas*, *Richard*, *Robert Younge* and *George* above assigned and alleged for errors, and that the judgment aforesaid may be in all things affirmed. But because the court of our said lord the king

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here is not yet advised what judgment to give of and upon the premises, a day thereof is given to the parties aforesaid before our said lord the king until eight days of the holy *Trinity* wheresoever &c. to hear their judgment thereupon because the court of our said lord the king here is thereof not yet &c. At which day before our said lord the king at *Westminster* came the parties aforesaid by their attornies aforesaid; whereupon all and singular the premises seen, and by the court of our said lord the king now here more fully understood and diligently examined, and as well the record and proceedings aforesaid, and the judgment given thereupon, as the causes and matters aforesaid by the said *Robert Smith* and *Anne* his wife, *Nicholas Palmer*, *John Barraclugh*, *Thomas Palmer*, *Richard Browne*, *Robert Younge* and *George Jurdison*, assigned for error being inspected, for that it appears to the court of our said lord the now king here, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid: therefore it is considered that the said judgment be in all things affirmed, and stand in full force and effect, the several matters and causes above for error assigned in any wise notwithstanding. And it is further considered, that the said *Samuel* do recover against the said *Robert* and *Anne*, *Nicholas*, *John*, *Thomas*, *Richard*, *Robert* and *George* 8l. adjudged to the said *Samuel* by the court of our said lord the king now here, according to the form of the statute in such case made and provided, for his damages, costs and charges, which he had by reason of the delay of execution of the said judgment, on pretence of the prosecution of the said writs of error, and that the said *Samuel* have execution thereof &c.

Judgment affirmed.

Case 64

Smith & al' *versus* Martin.

Hil. 23 & 24 Car. II. Regis. Rot. 545.

S. C. 3 Keb. 44.
In an action on
the case a garden
may be said to
be part of a
messuage, and by
demand it shall

ERROR to reverse a judgment given in the county palatine of *Durham*, wherein *Martin* was plaintiff against *Smith* and others defendants, where the plaintiff declared

That name may pass in a conveyance, although in a *præcipe quod reddat*, where land is to be demanded by the name of a garden.

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that he was seised of a dwelling-house with the appurtenances in the city of *Durham*, whereof a house called the *Garden-house*, otherwise the *House on the Wall*, and a garden were parcel, in his demesne as of fee; and being so seised the defendants intending to injure him did dig stones in a certain piece of ground called the *Bank*, otherwise the *Mote-side*, in the city of *Durham* aforesaid, so near to the house called the *Garden-house*, otherwise the *House on the Wall*, and the said garden, that the said house and 300 perches of a stone-wall inclosing the said garden afterwards, to wit &c. entirely tumbled down, and fell down on the ground in the said piece of land so dug, to the plaintiff's damage of 100l. and therefore he brought his action. The defendants pleaded not guilty, and a verdict and judgment against them, upon which they brought their writ of error.

And *Saunders* assigned for error at the bar that the plaintiff had brought his action for subverting the wall of his garden, but had not shewn where the garden was situate, nor whether he had any estate in the garden or not. For all that he has said to this purpose is, that he was seised of a dwelling-house, whereof the garden was parcel; which is impossible, because a garden cannot be *parcel* of a dwelling-house, although it may be *appurtenant* (2) to a dwelling-house.

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(2) A man makes a feoffment of a house *with the appurtenances*, nothing passes by the words "*with the appurtenances*," but the garden, curtilage and close adjoining to the house, and on which the house is built, and no other land, although other land has been occupied with the house: and in the time of *Henry* the 8th, it was usual to add these words, "and all lands, tenements and hereditaments appertaining to the said house, and being occupied, let or set with the same;" and by these words the land used to pass with the house. Bro. *feoffment de*

terres 53. 2 Rep. 32. a. *Bettisworth's* case. 1 P. Will. 603. *Blackborn v. Edgley*. Cro. Jac. 526. *Smithson v. Cage*. But Lord *Coke* confirms Lord *Hale*, and says that by the grant of a messuage, or house, the orchard, garden and curtilage do pass, without the word "*appurtenances*," and an acre or more may pass by the name of a house. Co. Litt. 5. b. 56. a. b.; and in Plow. 171. a. *Hill v. Grange*, it is held that a garden and curtilage are parcel of a messuage. And by the devise of a messuage only without the words "*with the appurtenances*," it has been adjudged.

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house and a garden are two distinct things in themselves, and are demandable in a *præcipe* by distinct names, as appears in the register of original writs ; wherefore a garden cannot be parcel of a dwelling-house ; and so the plaintiff has made no title to the garden, nor does it appear where the garden is situate, and the damages being assessed entirely as well for

judged that the curtilage and garden should pass. 3 Leon. 214. *Chard v. Tuck*. Cro. Eliz. 89. S. C. Indeed in *Keilw.* 57. it is said that a garden is not parcel of a house or messuage ; and in *Moor.* 24. pl. 82 it was held that by a grant of a messuage or tenement, neither garden, nor land, doth pass ; for by the word *messuage* nothing passes but the house and circuit of the house ; a garden is a distinct thing, for in a *præcipe quod reddat* the writ shall say, *one messuage and one garden*. However the best opinion seems to be agreeable to what is said by Lord *Coke* and Lord *Hale*, that the garden is parcel of the house and shall pass by a grant or devise of the house. In the above cited case out of *Keilway*, a distinction is taken between a *messuage* and *house* ; that *messuage* extends to the *curtilage*, though not to the *garden*, but that *house* only comprehends buildings. But this distinction has been justly reprobated as too subtle and artificial ; there being no real difference between them, for whatever would pass by the one, would equally pass by the other. 2 Term Rep. 502. *Doe v. Collins*. But it has been holden that a devise of a house “ with the appurtenances thereto or in any manner belonging,” will not pass land at a distance, though used and occupied by the testator with the house. Cro. Car. 57. *Hearn v. Allen*. Hutt. 85. S. C. But what shall be said to

pass by a devise of a messuage or dwelling-house only, or of a dwelling-house with the appurtenances, is purely a question of intention to be collected, as in other cases of intention, out of the whole will. Thus a devise of “ messuages with all houses, barns, stables, stalls &c. that stand upon or belong to the said messuages,” under special circumstances clearly manifesting the intention of the testator to devise the lands belonging to the messuages, was held to pass those lands. 3 Willf 141. *Gulliver v. Poyntz*. 2 Black Rep. 726. S. C. So where a testator being tenant for years of a house, gardens, stables, and coal-pen, bequeathed in the following words ; “ I give the house I live in and garden to B.” it was adjudged that the stables and coal-pen occupied by the testator together with the house, passed though not expressly named, and though the testator used them for purposes of trade as well as for the convenience of his house. 2 Term Rep. 498. *Doe v. Collins*. see also 2 Black. Rep. 1148. *Doe v. Martin*. But unless it clearly appears that the testator meant to extend the word “ appurtenances,” beyond its technical sense, lands usually occupied with a house will not pass under a devise of a messuage with the appurtenances. 1 Bos. & Pull. 53. *Buck v. Nurton*.

subverting the wall of the garden, as for subverting the house, no judgment ought to have been given for the plaintiff, and therefore he prayed that the judgment should be reversed.

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Sed non allocatur; For a garden may be said to be parcel of a house, and by that name will pass in a conveyance; and although in a *præcipe quod reddat* it must be demanded by the name of a garden, yet in this action, which is only to recover damages for a wrong, and no land is demanded, it is well enough alleged (3). Wherefore the judgment was affirmed.

(3) See ante, 113.
Coryton v. Lutke-
bye, note [1].

Pearle *versus* Bridges.

Case 65.

III. 23 & 24 Car. II. Regis. Rot. 1182.

TRESPASS for breaking the plaintiff's close and eating up the grass there with cattle. The defendant pleads that at the time of the trespass supposed, he was *possessed* of all the corn growing on 4 acres of land parcel of the said close in which &c. as of his own proper corn, wherefore at the time when &c. he entered with his cattle to reap, take and carry away the said corn, and in entering the cattle did the trespass *raptim* and *sparsim* &c., and so justified the trespass precisely. To which the plaintiff demurred.

S. C. 3 Keb. 61.
In trespass
clausum fregit,
it is not enough
for the defend-
ant to say *he was*
possessed of a par-
cel of corn there,
and that he en-
tered to reap it,
but he must shew
a special title to
it.

And it was adjudged by *Hale* chief-justice, *Twydden* and *Rainsford*, *nemine contradicente*, that the plea was bad, because the soil of close is acknowledged to be in the plaintiff, therefore the corn shall be intended to belong to him also, unless the defendant shews a special title to the corn, which he hath not done here. And it is not enough for the defendant to say that he was *possessed* of the corn as of his own proper corn, without shewing a special title to it, because *prima facie* it shall be intended that the property of the corn is in the owner of the soil; and this shall not be contradicted but by a special title to them: wherefore the plea was adjudged bad in substance (4).

(1) It seems to be an established rule of pleading, that wherever the defendant in trespass *clausum fregit* justifies the trespass by reason of some title, or case-

PEARLE v. BRIDGES. But the defendant on payment of costs had leave to amend his plea, and to shew his title to the corn, which he did accordingly. Wherefore no judgment was entered on the roll in this case.

easement, which gives him a legal right to do the act which is the subject of the action, he must set forth his title, or right to enjoy the easement specially, so that the plaintiff may have an opportunity of traversing it; and so it is in replevin. But in trespass for *taking cattle or goods*, it is enough for the defendant to state his possession only.

Slowe *versus* Wilmott.

Pasch. 24 Car. 2. Regis. Rot. 317.

S. C. 3 Keb. 61.
The want of a profert of letters of administration is matter of form only, and good on a general demurrer.

ASSUMPSIT. The plaintiff declared as administrator, but at the end of the declaration he did not bring his letters of administration into court, and on an insufficient plea the plaintiff demurred, and the defendant also joined in demurrer, and he now insisted on the default of not shewing the letters of administration,

And it was ruled by *Hale* chief-justice, *ceteris tacentibus*, that it was only matter of form and not matter of substance, because, as he said, it was not a fault in the declaration itself, but an omission of a thing which ought to be inserted at the end of the declaration, and therefore no advantage can be taken of it on a general demurrer. Yet *Saunders* for the defendant urged that there were twenty books to prove it to be a matter of substance (a); which the chief-justice confessed, but he said that the opinion had been otherwise for ten years past; but I believe he meant his own opinion: therefore the plaintiff had judgment (1).

(a) Cro. Jac.
409. *Cutts v. Bannet*.

(1) However it is now expressly made matter of form by statute 4 Ann. c. 16. s. 1. and must be specially demurred to.

Blackmor *versus* Mercer & al'.

Pasch. 24 Car. 2. Regis. Rot. 412 & 413.

SCIRE FACIAS against the defendants as executors to have execution of the costs and damages recovered against their testator in an ejectment, to be levied *de bonis propriis*, upon the return of an inquisition by the sheriff whereby it was found, that divers goods and chattels, which were of the said testator, came to the hands of the said executors, which the said executors sold, eloigned, and converted, and disposed to their own use. The defendants come in and traverse that they sold, eloigned &c. and the plaintiff maintains the inquisition, that the executors had sold, eloigned and converted to their own use, as it was found by the inquisition, and tenders an issue on it: to which the defendants demur.

And now in this term *Saunders* for the defendants objected, that here neither the inquisition, nor the plaintiff's replication are sufficient to charge the defendants *de bonis propriis*; for no *devastavit* is found by the inquisition, or alleged by the plaintiff: and the defendants might have well sold, eloigned and disposed of the testator's goods, because they had paid the testator's debt to the value of the goods with their own money, and therefore, although it is a sale, eloignment or conversion, yet it is no *devastavit*; wherefore there ought to be a *devastavit* found or alleged, otherwise the defendants are not chargeable of their own goods.

Sed non allocatur; for by *Hale* chief justice, perhaps the defendants had not actually wasted the goods of the testator, but had them in their hands *in specie*, and kept them so secretly that the sheriff could not find them to levy the plaintiff's debt upon them; therefore it is reasonable that the defendants should be charged *de bonis propriis*, although there is no *devastavit* in the case. And for this reason, which seems to me to be the best, it was adjudged for the plaintiff.

BLACKMOR
v. MERCER
& al'.

Case 67.

S. C. 1 Vent.
221. 3 Keb. 62.
1 Sid. 412. In an inquisition returned by the sheriff on a *scire fieri inquiry*, it was found, that the executors had sold, eloigned, and converted, and disposed to their own use divers goods of the testator. The defendants plead that they had not sold, eloigned &c., and the plaintiff replies, that they had sold, eloigned &c. and tenders an issue. Defendants demur. The words "*sold, eloigned, and to their own use converted, &c.*" are sufficient, though it be not expressly found or alleged that the defendant had wasted the goods (1).

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(1) See 1 Saund. 307. *Merchant v. Driver*. S. P. Ibid. 219. b. c. *Wheatly v. Lane*, note (8).

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Lord Arlington *versus* Merricke.

Hil. 23 & 24 Car. 2. Regis. Rot. 665.

Debt on bond.

LONDON, to wit. Be it remembered that heretofore, to wit, in the term of *St. Michael* last past before our lord the king at *Westminster* came the right honorable *Henry Lord Arlington* of *Harbington* by *Edward Meriweather* his attorney, and brought here into the court of our said lord the king then there his certain bill against *Benjamin Merricke*, otherwise called *Benjamin Merricke* of *Woodstock* in the said county, in the custody of the marshal &c. of a plea of debt, and there are pledges of prosecution, to wit, *John Roe* and *Richard Roe*, which said bill follows in these words, to wit: *London*, to wit, The right honorable *Henry Lord Arlington* of *Harbington* complains of *Benjamin Merricke*, otherwise called *Benjamin Merricke* of *Woodstock* in the said county, being in the custody of the marshal of the marshalsea of our lord the king before the king himself, of a plea that he render to him 200l. of lawful money of *England*, which he owes to and unjustly detains from him, for that whereas the said *Benjamin* on the first day of *May*, in the 19th year of the reign of our lord *Charles* the Second, now king of *England* &c., at *London* aforesaid, to wit, in the parish of *St. Mary Underbass* in the ward of *Lyme-street*, by his certain writing obligatory sealed with the seal of the said *Benjamin*, and to the court of our said lord the king now here shewn, the date whereof is the same day and year, acknowledged himself to be held and firmly bound to the said *Henry Lord Arlington* in the said 200l. to be paid to the said *Henry Lord Arlington*, when he should be thereunto required, yet the said *Benjamin* (although often required) has not yet paid the said 200l. to the said *Henry Lord Arlington*, but to pay the same to him has hitherto altogether refused and still refuses, to the damage of the said *Henry Lord Arlington* of 20l., and therefore he brings suit &c.

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Plea.

And now at this day, to wit, on *Tuesday* next after the octave of *St. Hilary* in this same term, until which day the said *Benjamin Merricke* had leave to imparl to the said bill and

then

then to answer &c., before our lord the king at *Westminster* comes as well the said Lord *Arlington* by his attorney aforesaid, as the said *Benjamin* by *John Gale* his attorney, and the said *Benjamin* defends the wrong and injury when &c., and prays oyer of the said writing obligatory, and it is read to him &c.; he also prays oyer of the condition of the said writing, and it is read to him in these words, to wit, "The condition of this obligation is such, that whereas the above-named *Henry Lord Arlington* postmaster-general to the king's most excellent Majesty, by his sufficient instrument or writing under his hand and seal, bearing date the thirtieth day of *April* one thousand six hundred sixty and seven, hath deputed the above bounden *Thomas Jenkins* to be his deputy postmaster of the stage of *Oxon* in the county of *Oxon* aforesaid, to execute the said office from the twenty-fourth day of *June* next coming for the term of *six months* following. Now if the said *Thomas Jenkins*, his deputies, servants and assigns do and shall, *for and during all the time* that he the said *Thomas Jenkins* shall continue deputy postmaster of the said stage, well, truly, faithfully and diligently do, execute and perform all and every the duties belonging to the said office of deputy-postmaster of the said stage, and shall faithfully, justly, and exactly observe, perform, fulfil and keep all and every the instructions, rules, orders, payments and directions mentioned, contained, specified and included in the paper annexed to this obligation, intituled instructions for the several deputy-postmasters from his majesty's postmaster-general, according to the true intent and meaning of the said instructions, and every of them; the true copy or counterpart whereof is delivered upon the sealing of these presents unto the said *Thomas Jenkins* subscribed by the said *Henry Lord Arlington*, and examined before the witnesses to these presents; and also if the said *Thomas Jenkins*, his deputies, servants and assigns, shall well and truly observe, perform, fulfil and execute all such other orders, rules, directions and instructions as the said *Henry Lord Arlington*, his executors, administrators or assigns, or his deputies in the general post-office in *London*, shall from time to time give or send to the said *Thomas Jenkins*, his deputies or assigns, signed by the said Lord *Arlington*,

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or by his deputy in the said general post-office for the time being, for or concerning the management of the place of deputy postmaster of the said stage of *Oxon*; that then this obligation to be void, or else to stand and remain in full force and virtue."

He also prays oyer (1) of the said instructions mentioned in the said condition, and they are likewise read to him in these words, to wit, "Instructions for the several deputy-postmasters from his Majesty's postmaster-general:

1. You shall keep sufficient able geldings or mares for no other service but for the post of the mail of letters passing to and from his Majesty's post-office in the city of *London*, from the stage at *Oxford* unto the stage of *Abingdon*, to and fro, and you shall carefully and faithfully send or carry the said mails to the said several stages three times in every week during your continuance to be deputy postmaster of *Oxford* in the county of *Oxon*, upon the several days and hours as the same shall come or be sent unto the said several stages for that purpose: and you shall in like manner send or carry with all care, diligence and faithfulness, the said several stages, all and every such expresses as shall come unto the same to be dispatched for his Majesty's special service; and you shall also provide and maintain a sufficient number of able mares or geldings, with furnitures for the same, for the use and service of all such posters as shall have lawful warrant or commission to ride post from your said stage.

2. You shall cause all and every such servant, as you shall trust to ride with and carry the said mails and expresses the said several stages, to ride at least five *English* miles winter and

(1) The praying of oyer of the instructions seems to be improper; because there is no *profert* made of them by the plaintiff, and it does not appear that they were in court; but they are only referred to in the conditions as the instructions which the defendant had obliged himself by his bond to perform; in the same manner as if the condition

had been to perform covenants in an indenture, in which case it has been decided that the defendant cannot pray oyer of the indenture, but must set out the whole substance of one part of the indenture, and make a *profert* of it, otherwise it will be bad on special demurrer. 1 Saund. 8. *Jevens v. Harridge*, 2 Salk. 498. *Cook v. Remington*.

and summer, in every hour that he or they shall ride or carry any of the said mails and expresses, and the rest of his time according to that proportion of speed : and you shall truly and exactly indorse upon a label the hour and time of the night or day, with the day of the month on which every of the said mails and expresses shall come unto the stage of *Oxford*; and you shall also enter the same in a book to be kept by you for that purpose, and you shall have your horses and furniture for the carriage of the said mails on the respective days and times in such readiness and expectation, that you shall not detain, stay or delay any mail in its postage from the city of *London* above one quarter of an hour at the most, neither shall you stay or delay any mail in its postage unto the city of *London* above one quarter of an hour at the most.

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3. You shall employ only such servants for riding post to carry the said mails and expresses, for whose faithfulness, care and diligence, and riding with the expedition in these instructions required, without stop or stay, saving by some act of God or force or absolute necessity, as you will be responsible, and thereupon answer the damage that may by your servants' failure happen either unto the Majesty's affairs or unto the post-office; and you shall employ none that you are not sure is conformable to the discipline of the church of *England*.

4. You shall cause every one that rides with the said mails or expresses to ride with a horn, and to wind the same at least four times in every stage, and also upon his riding through every town or village; and upon his meeting with any passengers upon the road.

5. You shall publish in your said town of *Oxford*, and in every market-town adjacent, from whence any letters or packquets hath usually come unto your said stage of *Oxford* to be carried with the said mails, as also in every other market-town from whence you may expect that letters and packquets may hereafter be brought unto your stage to go with the said mails, you shall publish and proclaim at least upon the market days, in full market, every three months, the several days of the week, and hours of the same days, whereupon letters may and shall be received at your said stage to be sent unto the post-office in the city of *London*, or unto any great town or

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city upon the post-road, and the several days and hours of the said mails being sent from your said stage, in its passage to and from the city of *London*, and the days and times of the returns of the said mails unto your said stage, and also the rate at which letters shall be carried to and from your said stage, and to and from any other city or town upon the post-road; and you shall also publish that the post-office is erected by his Majesty for the benefit and ease of his subjects, in the carrying and delivering of all letters with extraordinary speed and safety, and that it is his Majesty's pleasure that all letters of speed should be sent by the posts belonging to that office.

6. You shall write upon all such letters as shall be sent from your stage unto the post-office in *London*, the several due rates for the post of the same, and you shall bind the same in several bundles, according to the several rates set for the post thereof, binding all that are to pay or have paid three pence in one bundle; and in like manner binding together all those of other rates, and you shall insert in a small bill of paper, the number of all letters and packquets that shall be from time to time sent from your said stage unto the said post office, and the rates of the same distinctly, expressing how many letters you send at the rate of two-pence, and how many at the rate of three pence, and likewise of all other rates; and you shall insert in the same bill all letters sent from town to town in the road in any by-bag, with the rates paid for the same, and you shall send the said bill subscribed with your hand, with every mail of letters unto the said post-office.

7. You shall not receive any letters or packquets directed to any seaman, or unto any private soldier, or unto such as have not plain, distinct and certain directions, or any such as are directed to be sent from the post-office in *London* unto other places, unless you be first paid for the same, and do charge the same to your accompt as paid.

8. You shall cause your servants riding post with the said mails from time to time to render an accompt unto the deputy-postmaster from the stage unto the which you shall appoint him to carry the said mails, of all letters received on the road, either paid for or not paid for, and to deliver the monies received for any letters or packquets unto the said deputy-

deputy-postmaster, that the whole number of letters so received may be inserted into his bill, then to be dispatched to the office; and you shall most strictly enjoin all your servants to give the said accompt truly, that no letters paid for be imbezelled or lost, lest your bonds be sued upon any complaint that should arise thereupon: and you shall strictly prosecute your said servant upon any complaint of the loss of any letter delivered and paid for on the road, to have him whipped publicly for a cheat, and you declare these your resolutions unto all your servants before you employ them in the said service.

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9. You shall cause all letters and packquets to be speedily, without delay, carefully and faithfully delivered, that shall from time to time be sent unto your said stage to be dispersed there, or in the towns and parts adjacent, that all persons receiving such letters may have time to send their respective answers unto your stage and other place appointed by the respective returns of the said mails.

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10. You shall receive for the post of all letters and packquets that shall be dispersed and delivered by yourself and your appointment according to the rate and tax set upon them; and you shall keep a true, just and exact accompt of all such monies as shall be received by you, and by your appointment for the post of all letters and packquets, and also of all by letters and packquets whatsoever, that come to and from your stage; and at the end of every month, you shall, without farther delay, cause all such monies to be paid into the post-office in the city of *London*, unto the use of the postmaster general *Henry Lord Arlington*, either by good and allowable bills of exchange for the same payable upon sight, sent unto the said office at the end of the said month, or otherwise.

11. When any letters or packquets shall at any time happen to remain at your said stage, or any place under your care and charge for the delivery of letters, you not knowing to whom to deliver the same, you shall forthwith cause to be written in a fair sheet of paper, the names of the parties to whom the same are directed, and affix the same upon your outward gate or door, or upon some public place in any other town where you are appointed to deliver letters as you shall see

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cause by the direction of the same, and thereby give notice unto all goers and comers, that such letters and packquets remain there undelivered; and at the end of every month you shall send unto the post-office of *London*, all such letters as shall, notwithstanding such notice as aforesaid, remain during one month's time neglected, with the reason why the same could not be delivered, that a just defalcation may be made unto you for the same upon your accompt.

12. You shall not without special order open, nor suffer to be opened, any mail or bag of letters whatsoever that shall pass your said stage, saving such only as shall be sent unto you with letters to be delivered and dispersed either at your said stage, or in the parts and branches of the post-road adjacent, and saving the by-bag for the putting in letters taken up upon the road by those that shall ride with the said mails.

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13. You shall attend the service of deputy-postmaster of your stage in your own person, unless very urgent necessary occasions shall call you for some small time or times only to be absent, and at every such time you shall appoint some trusty and discreet person to supply your place, for whose care and faithfulness you shall be responsible, that no neglect or failure may happen either in the speedy passing of the said mails, or in the delivery of letters, or in any other thing concerning the said service.

14. You shall to the utmost of your ability and skill, by all lawful ways and means, promote the king's Majesty's service and the benefit and advantage of *Henry Lord Arlington* postmaster-general of the said post-office in your place of deputy-postmaster of your said stage of *Oxford*; and you shall from time to time observe to execute all such other rules, orders, directions and instructions in and concerning the management of your said place of deputy-postmaster, as you shall receive from the said *Henry Lord Arlington* postmaster-general, his executors, deputy and assigns, and you shall quietly submit and render up your said place as forfeited, if any unfaithfulness be proved against you in the execution thereof, notwithstanding any agreement whatsoever between the said *Henry Lord Arlington* postmaster-general and you at the entry into your said place of deputy-postmaster."

Which

Which (2) being read and heard, the said *Benjamin* says that the said *Henry Lord Arlington* ought not to have or maintain his said action thereof against him, because he says that the said *Thomas Jenkins* in the said condition mentioned from the time of making the said writing obligatory hitherto hath well, truly, faithfully and diligently executed and performed all and every the duties belonging to the office of deputy-postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled and kept all and every the instructions, rules, orders, payments and directions mentioned, contained, included and specified in the said instructions according to the true intent and meaning of the said instructions. And the said *Benjamin* further says, that the said *Thomas Jenkins* from the time aforesaid did not receive any letters or packquets directed to any seaman or private soldier, or to any such as had not plain, distinct and certain directions, or any such as were directed to be sent from the post-office in *London* unto other places, unless he the said *Thomas* was first paid for the same, and did so charge himself in his account with the same as paid; and that he the said *Thomas* did not without special order open, or suffer to be opened any bag of letters which passed his stage, saving such bag only as was sent to him with letters to be delivered or dispersed at the said stage, or in the parts and branches of the post-road adjacent, and saving also the by-bag for the putting in letters taken up upon the road by the person who rode with the said mails. And the said *Benjamin* further says, that the said *Lord Arlington* or his deputies in the general post-office in *London*, did not give or send any other orders, rules, directions or instructions to the said *Thomas Jenkins* or his deputies signed by the said *Lord Arlington* or his deputy in the

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Defendant pleads
a general perfor-
mance.

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(2) It is holden that a defendant cannot plead conditions performed, to an action of debt on bond conditioned for performance of covenants, without first praying over of the condition of the bond, and setting it out *in hac verba*, and then stating the whole substance of

the deed containing such covenants, and making a profert of it. 1 Saund. 8. *Jewens v. Harridge*. 1 Sid. 50. Ibid. 97. *Lewes v. Ball*. Ibid. 425. *Tapscot v. Wooldridge*. 1 Vent. 37. *Anon.* All. 72. *Ellis v. Box*. Carth. 5. *Fortune v. Davis*.

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faid general post-office of and concerning the management of the place of deputy-postmaster of the said stage of *Oxon* (3). And this he is ready to verify; wherefore he prays judgment if the said *Henry Lord Arlington* ought to have or maintain his said action thereof against him &c.

Replication,

protesting that the defendant did not perform the duties of his office or the order, contained in the instructions;

alleges a breach that T. J. received for the postage of letters 184l. 12s. which he had not paid.

And the said *Henry Lord Arlington* says that he, by any thing by the said *Benjamin* above in pleading alleged, ought not to be barred from having his said action thereof against him, because protesting that the said *Thomas Jenkins* in the said condition mentioned from the time of making the said writing obligatory hitherto did not well, truly, faithfully and diligently execute and perform all and every the duties belonging to the office of deputy-postmaster of the said stage, and faithfully, justly and exactly observe, perform, fulfil and keep all and singular the instructions, rules, orders, payments and directions mentioned, contained, included and specified in the instructions according to the true intent and meaning of the said instructions: for plea the said *Henry Lord Arlington* says, that on the last day of *September* in the 22d year of the reign of our lord *Charles* the second now king of *England* &c., until which time the said *Thomas* continued deputy-postmaster of the said stage according to the said condition, at *London* aforesaid, to wit, in the parish of *St. Andrew Under-shaft*, in the ward of *Lyme-street*, the said *Thomas Jenkins* received for the postage of letters and packquets which were before then dispersed and delivered by the said *Thomas* and his appointment according to the rate and tax set upon them, the sum of 184l. 12s. of lawful money of *England*; and that the said *Thomas Jenkins* on the said last day of *September* in the 22d year aforesaid, or hitherto, has not caused the said 184l. 12s. to be paid into the post-office in the said city of *London*, to the use of the said *Henry Lord Arlington* the post-

(3) Where all the matters to be performed are in the affirmative, as in this case, it is a settled rule that it is sufficient for the defendant to plead a performance generally in the words of the condition; and it must come from the

other side to shew a breach committed by the defendant. Co. Litt. 303. b. Cro. Eliz. 749. *Mints v. Bethil*. See 1 Saund. 116. *Cutler v. Southern*, note (1).

master

master-general, either by good and allowable bills of exchange for the same payable upon sight, sent unto the said (4) office, to wit, at *London* aforesaid in the parish and ward aforesaid, or otherwise. And this he is ready to verify; wherefore he prays judgment and his debt aforesaid together with his damages on occasion of the detention of the debt aforesaid to be adjudged to him &c.

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And

(4) It is to be observed, that the breach is here assigned *generally*, namely, that the defendant received a *certain sum* for the carriage of *letters and packets*, without specifying either their number or the different sums of money which he received for the postage of them. This seems to be the proper mode of assigning the breach in cases like the present; it being a rule of pleading, that where a subject comprehends multiplicity of matter, there, in order to avoid prolixity, the law allows of general pleading. 1 Term Rep. 753. *J. Anson v. Stuart* per Buller justice. 1 Lut. 421. *Parkes v. Middleton*. As where in debt on bond, the defendant prayed oyer of the condition which was that the defendant, who was appointed agent of a regiment, should well and duly pay all such sum and sums of money as he should receive from the paymaster-general for the use of the regiment, and faithfully account and indemnify the plaintiff. Plea, a general performance, and that the plaintiff was not damnified. Replication, that the defendant received from the paymaster-general, for and on account of the said regiment, *several sums of money amounting in the whole to 1400l.*, but the defendant had not paid them; and on demurrer it was held that the breach was sufficiently assigned. 2 Burr.

772. *Cornwallis v. Savery*. So where in debt on bond conditioned for J. S.'s rendering and paying to the plaintiff a true and just account, payment and delivery of all monies, bills, &c. which he should receive as his agent, the defendant pleaded performance in the words of the condition; replication that J. S. received *divers sums of money amounting to 2000l. belonging and relating to the plaintiff's business as his agent*, and had not rendered to the plaintiff a true, just and fair account, payment and delivery of the said sum of 2000l. or any part thereof. The defendant demurred specially to this replication, and shewed for cause that the plaintiff had not stated therein from whom, or in what manner, or in what proportion the said sums amounting to 2000l. were received by J. S. And in support of the demurrer, and to shew that the replication was too general, the case of *Jones v. Williams*, Doug. 214. was cited. But the replication was adjudged to be sufficient and warranted by the rules of law and precedents: and the court seemed to overrule the above mentioned case of *Jones v. Williams*. 1 Bos. & Pull. 640 *Shum v. Farrington*. So where in debt on bond conditioned that B. R. should from time to time account for and pay over to the plaintiff as treasurer of a charity

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Demurrer.

And the said *Benjamin* says, that the plea aforesaid by the said *Henry Lord Arlington* in manner and form aforesaid above in replying pleaded, and the matter in the same contained, are not sufficient in law for the said *Henry Lord Arlington* to have his said action thereof maintained against him the said *Benjamin*, to which he the said *Benjamin* has no necessity, nor is bound by the law of the land in any wise to answer. And this he is ready to verify; wherefore for want of a sufficient replication in this behalf, he the said *Benjamin*, as before, prays judgment, and that the said *Henry Lord Arlington* may be barred from having his said action thereof against him the said *Benjamin* &c.

Joinder.

And the said *Henry Lord Arlington* says that the plea aforesaid by him the said *Henry Lord Arlington* in manner and form aforesaid above in replying pleaded, and the matter in the same contained, are good and sufficient in law for him the said *Henry Lord Arlington* to have his aforesaid action thereof maintained against him the said *Benjamin*, which said plea and the matter in the same contained he the said *Henry Lord Arlington* is ready to verify and prove as the court &c. And because the said *Benjamin* doth not answer the said plea, nor in any wise deny the same, he the said *Henry Lord Arlington*, as before, prays judgment and his debt aforesaid, together with his damages on occasion of the detention of the said debt to be adjudged to him &c. But because the court of our said lord the king here is not yet advised what judg-

Curia advisare
vult.

such voluntary contributions as he should collect for the use of the charity, the defendant pleaded general performance; the plaintiff replied that B. R. had received divers sums, amounting to a large sum, viz. 100l. from divers persons for divers voluntary contributions, for the use of the said charity which he had not accounted for, or paid over; the defendant demurred specially, and shewed for cause that the plaintiff had not named the persons from whom R.

was supposed to have received the said sums of money, and that the breach was too vague and general; but the court were clearly of opinion that the replication was sufficiently certain; and they assented to the last cited case of *Shum v. Farrington*, in opposition to that of *Jones v. Williams*, which, they said, was never generally approved of in *Westminster Hall*. 8 Term Rep. 459. *Barton v. Webb*.

ment to give of and upon the premises, a day thereof is given to the parties aforesaid, before our lord the king at *Westminster* until day next after to hear their judgment of and upon the premises, because the court of our said lord the king here is thereof not yet &c.

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DEBT on bond dated the first day of *May* in the 19th year of the reign of the now king. The defendant prayed oyer of the condition, which is entered in these words, to wit; The condition of this obligation is such, that whereas the above-named *Henry Lord Arlington*, postmaster-general to the king's most excellent Majesty, by his sufficient instrument or writing under his hand and seal bearing date the thirtieth day of *April* one thousand six hundred sixty and seven, hath deputed the above bound *Thomas Jenkins* to be his deputy-postmaster of the stage of *Oxon* in the county of *Oxon* aforesaid to execute the said office from the twenty-fourth day of *June* next coming for the term of six months following. Now if the said *Thomas Jenkins* his deputies, servants and assigns do and shall for and during all the time that he the said *Thomas Jenkins* shall continue deputy-postmaster of the said stage well, truly, faithfully and diligently do, execute and perform all and every the duties belonging to the said office of deputy-postmaster of the said stage and shall faithfully, justly and exactly observe, perform, fulfil and keep all and every the instructions, rules, orders, payments and directions mentioned, contained, specified and included in the paper annexed to this obligation, intitled instructions for the several deputy-postmasters from his Majesty's postmaster-general according to the true intent and meaning of the said instructions and every of them, the true copy or counterpart whereof is delivered upon the sealing of these presents unto the said *Thomas Jenkins* subscribed by the said *Henry Lord Arlington*

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Arlington and examined before the witnesses to these presents; and also if the said *Thomas Jenkins* his deputies, servants and assigns shall and will well and truly observe, perform, fulfil and execute all such other orders, rules, directions and instructions as the said *Henry Lord Arlington* his executors, administrators or assigns, or his deputies in the general post-office in *London*, shall from time to time give or send to the said *Thomas Jenkins* his deputies or assigns, signed by the Lord *Arlington*, or by his deputy in the said general post-office for the time being, for and concerning the management of the place of deputy-postmaster of the said stage of *Oxon*, then this obligation to be void or else to stand and remain in full force and virtue. And thereupon the defendant prayed also oyer of the instructions annexed to the said bond, which are also entered *in hæc verba*; and among other articles one is, that the said *Jenkins*, at the end of every month, shall, without further delay, cause all such monies, (namely, the monies which he shall receive out of the profits of the said deputy-postmaster) to be paid unto the post-office in the city of *London* unto the use of the postmaster-general *Henry Lord Arlington*, either by good and allowable bills of exchange for the same payable upon sight sent unto the said office at the end of the said month or otherwise. And after oyer of the condition and of the said instructions, the defendant pleads generally that the said *Jenkins* performed all &c. To which the plaintiff replies, "that on the last day of *September* in the 22d year of the reign of the now king, until which time the said *Thomas Jenkins* continued deputy-postmaster of the said stage according to the said condition, at *London* aforesaid, to wit, in the parish of *St. Andrew Undershaft* in the ward of *Lyme-street*, the said *Thomas Jenkins* received for the postage of letters and packquets which were before them dispersed and delivered by the said *Thomas* and his appointment, according to the rate and tax set upon them, the sum of 18*l.* 12*s.* of lawful money of *England*, and that the said *Thomas Jenkins* on the said last day of *September* in the 22d year aforesaid, or hitherto, has not caused the said 18*l.* 12*s.* to be paid unto the post-office in the said city of *London* to the use of the said *Henry Lord Arlington* the postmaster-general, either by good
and

and allowable bills of exchange payable on sight sent unto the said office, to wit; at *London* aforesaid in the parish and ward aforesaid, or otherwise, and this &c. wherefore &c." Upon which the defendant demurred in law.

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And *Saunders* for the defendant took an exception to the replication for the want of a *venue*; for, as he said, there are two matters issuable in the replication; one, whether *Jenkins* continued deputy-postmaster; and the other, if he had received the monies alleged by the plaintiff to be received; and the defendant had liberty to take issue upon one, or the other, at his pleasure. But in the replication there is but one *venue* alleged, which cannot serve for both matters; for if it shall be said that the monies were received in *London*, then there wants a place where *Jenkins* continued deputy-postmaster; and if it shall be said that *Jenkins* continued deputy-postmaster in *London*, then there wants a *venue*, namely, a place where the monies were received; and therefore he concluded that the replication was bad for this fault.

And as to the matter of law, he argued that the replication was bad, because it is alleged that *Jenkins*, on the last day of *September* in the 22d year of the king, received the said monies; which is two years and more after the six months, mentioned in the condition in which *Jenkins* was appointed deputy-postmaster, were expired. And he said that the defendant by the intention of the condition was not to be responsible for *Jenkins* for any longer time than for the said six months, although the words are that *Jenkins*, during all the time that he shall continue deputy-postmaster &c. indefinitely, shall observe and perform &c., yet this time which is indefinite in itself ought to be construed only for the said six months, for which the condition recites that *Jenkins* was appointed to be deputy-postmaster, and to which the condition relates. And the rather because *Jenkins* cannot continue deputy-postmaster for any longer time than for the said six months, unless he be appointed anew, and have a new deputation for a longer time. And he said that by the construction which the plaintiff's counsel would put upon it, the defendant would be tricked; for it appears that the defendant intended to be bound for *Jenkins* for the due execution of the said office only for six

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months; but the plaintiff would have the defendant bound during the whole life of *Jenkins*, which is unreasonable to suppose. And therefore he held that the breach ought to have been assigned for non-payment of the monies received within the six months; and it not being so assigned, he concluded that the replication was bad and insufficient.

Offley for the plaintiff urged that the words in the condition *during all the time Jenkins shall continue deputy postmaster*, are indefinite of themselves, and do not relate to, nor are restrained by, the recital of the condition of the said six months; for although the recital says that *Jenkins* was appointed deputy-postmaster only for six months, yet the intention of the parties was that he should continue in the said office longer; and therefore the words of the condition, *during all the time Jenkins shall continue postmaster*, were inserted on purpose without restriction to any certain time, but left at large to the whole time that *Jenkins* should continue postmaster *de facto*.

Hale chief justice, as to the exception for want of a *venue*, said, that the replication was good enough, notwithstanding that exception; for the *venue* in the replication shall refer to the receipt of the monies; and a *venue* is not necessary where *Jenkins* continued deputy-postmaster. For if issue had been taken upon it, it would be tried by a *venue* of *Oxon* where *Jenkins* was appointed to be postmaster. But for the matter of law, he said that the condition shall refer to the recital only by which the defendant was bound only for six months and not longer, and that for the reason above alleged by *Saunders*. And of such opinion was the court; and *Twysden* cited a case between *Horton v. Day* (b), which is entered in this court in Mich. 22. Car. 1. Rot. 468. or 408. where in the condition of an obligation it was recited that a sheriff had appointed the defendant bailiff of a hundred within his county, "if therefore the defendant shall duly execute all warrants to him directed, that then &c." it was adjudged, that the words "all warrants" should be intended to be only all warrants which were directed to the defendant *as bailiff of the said hundred*, and not other warrants. And so here the words "during all the time" shall be intended, but only during the

The condition of the bond being larger than the recital, the recital shall restrain it; but see Hob. 230. St. John v. Diggs. (b) S.C. Sty. 28. All. 10.

said six months recited in the condition (5). Wherefore the court would have given judgment for the defendant; but then *Offley* moved that he would assign a breach within the six months; to which *Saunders* answered, that if there was any thing due to the plaintiff within the six months, his client would pay it without any suit; and upon this the chief justice said that it was not reasonable to permit the plaintiff to take advantage

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(5) This has been considered as a leading case upon this subject ever since. As where in debt on bond, conditioned that one W. B. should, during the time he should continue in the service of the plaintiff as a broad-clerk, keep just and true accompts of all monies received and paid, and from time to time pay all monies, which he should receive belonging to the plaintiff, into his hands, the defendant pleaded that the plaintiff at the time the bond was given carried on the trade of a brewer in his own name only, and the service in the condition mentioned was intended to be executed by the said W. B. to the plaintiff in his trade so carried on by him on his own account only; and that the plaintiff some time after entered into partnership with another, and that during all the time that the said W. B. continued in the service of the plaintiff alone, he performed the condition of the said bond: the plaintiff replied that the said W. B. was continued to be broad-clerk after the plaintiff had taken a partner, and that the said W. B. afterwards received 147l. 13s. on account of the plaintiff and his partner, which sum he had not paid: But on demurrer the court, on the authority of this case, and of *Horton v. Day*, cited by *Twysden*, held that the defendant, who was a surety only, ought not to be bound beyond the scope of his engagement, which was to be answerable for the fidelity of the said W. B. to the plaintiff only; and therefore, when he took in a partner, there was an end of the obligation; for as the condition was confined to the plaintiff only, and the breach assigned was for non-payment of the money to the plaintiff and his partner it was not within the condition, and gave judgment for the defendant. 3 Wils. 530. *Wright v. Ruffel*. 2 Black. Rep. 934. S. C. So where in debt on bond, conditioned, reciting that the defendant was the plaintiff's receiver at *Bristol*, if therefore he did well and truly account for all sums by him received, then the bond to be void; the breach was that he received so much money, and did not account for it; and because it appeared by the recital in the condition to be only about transactions of a particular nature, the general assignment of the breach was held ill on the authority of this case. *African Company v. Mason* cited in 1 Str. 227. *Stibbs v. Clough*. So where in debt on bond, conditioned that one H. whom the obligee had taken as a clerk, should give a true and just account of, and pay unto the obligee, his executors and administrators, all money which the said

LORD AR- advantage of the penalty of the bond for a small sum, and
LINGTON v. therefore he would not suffer the plaintiff to discontinue, but
MERRICKE. adjourned the cause over to the next term ; but the opinion
 of the court was clear with the defendant.

Note ;

said H. should from time to time receive, for and on account of the said obligee, his executors or administrators ; the defendant pleaded performance ; the plaintiff replied that the obligee died, and appointed the plaintiffs his executors, who carried on the trade of the obligee after his death, and that the said H. upon the death of the obligee continued in the service of the plaintiffs as their clerk, and that whilst the said H. continued in their service he received the sum of 50*l.* belonging to the plaintiffs as executors, which he had not paid. It was adjudged that the defendant was not liable ; for the bond was given to the obligee as an indemnity that the clerk should be faithful to him, and should pay all the money received on his account for him, or to his executors, and it was not the intention of the parties that the bond should be extended beyond the obligee's life ; and it was said to be just like this case of Lord *Arlington v. Merricke*. 1 Term Rep. 287. *Barker v. Parker*. But where the security is given to the house, as a banking house for instance, for the fidelity of a clerk in the shop and counting house, and not to particular persons ; a change of partners is held to make no difference, but the surety still continues liable. As where the condition of a bond, reciting that the plaintiffs had agreed to take one P. J. into their service and

employ as a clerk in their shop and counting-house, and the obligees had agreed to become security for his fidelity as far as 500*l.* each, declared that if the said P. J. should faithfully account for and pay to the plaintiffs all sums of money he should at any time receive in the service of the plaintiffs, then the bond to be void. In an action upon this bond a verdict was found for the plaintiffs upon a case which stated, that after the bond was given, one R. S. was taken into partnership with the plaintiffs, and that afterwards the said P. J. received a sum of money on account of the new partnership, and had not paid over to the plaintiffs. The court thought this case materially distinguishable from the above-cited of *Wright v. Ruffel* ; for in this case the security was to the house of the plaintiffs, but in that it was only to *Wright* personally, and the breach assigned was for embezzling the whole partnership money. *Barclay v. Lucas*, 1 Term Rep. 791. note (a). But where a bond was given by A., reciting that B. intended to open a banking account with C. D. and E. as his bankers, the condition of which bond was for payment to them of all sums from time to time advanced to B. at the banking-house of C. D. and E. : it was holden that on C.'s death such obligation ceased, and did not cover future advances made after another partner

Note ; I was informed by my client that the plaintiff had made a new deputation to *Jenkins*, and had taken a new security ; but because the new security proved insolvent, he brought this action against the defendant.

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partner was taken in ; and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance, which was applied at the time to the payment of the old debt incurred in C.'s life time, A. was wholly discharged from the obligation : and the court thought this question concluded by the cases of *Arlington v. Meyrick*, *Wright v. Ruffel*, and *Barker v. Parker*. 3 East. 484. *Strange v. Lee*. So where the condition of a bond, reciting that the defendant had agreed with the plaintiff

to collect their revenues from time to time for twelve months, was, that at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed, he would justly account and obey orders &c. ; it was held that the obligation was confined to the period of twelve months mentioned in the recital ; and Lord *Arlington v. Meyrick* was relied upon and recognised as a case expressly in point. 6 East. 507 *Liverpool Waterworks Company v. Atkinson*.

Walton versus Waterhouse.

Case 69.

Pasch. 24 Car. II. Regis. Rot. 180.

LONDON, to wit. Be it remembered, that on *Wednesday* next, after 15 days of *Easter* in this same term, before our lord the king at *Westminster* came *Thomas Walton* gent., son and heir of *Thomas Walton* his late father deceased, one of the clerks of *Sir Robert Henley* knt., chief clerk of our lord the king assigned to enrol pleas in the court of our said lord the king before the king himself, according to the liberties and privileges for such chief clerk and his clerks from time whereof the memory of man is not, to the contrary used and approved of in the same, in his proper person, and brought here into the court of our said lord the king then there his certain bill against *Jasper Waterhouse* gent., one of the clerks of *Sir Thomas Fanshaw* knt., coroner and attorney of our said lord the king in the said court of our said lord the king before

S. P. 2 Mod.
Ent. 39.

the

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the king himself present here in court in his proper person, of a plea of breach of covenant, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit: *London*, to wit, *Thomas Walton* gent., son and heir of *Thomas Walton* deceased, one of the clerks of Sir *Robert Henley* knt., chief clerk of our said lord the king assigned to enrol pleas in the court of our said lord the king before the king himself, according to the liberties and privileges for such chief clerk, and his clerks from time whereof the memory of man is not to the contrary used and approved of in the same, in his proper person complains of *Jasper Waterhouse* gent. one of the clerks of Sir *Thomas Fanshawe* knt. coroner and attorney of our said lord the king in the court of our said lord the king before the king himself present here in court, in a plea of breach of covenant, for this, to wit, that whereas the said *Thomas Walton* the father in his life time, to wit, on the 4th day of *August* in the year of our lord 1650, was seised of and in a certain dwelling-house with the appurtenances, situate, lying and being in the parish of *St. Bridget*, alias *St. Brides*, *London*, in the ward of *Farringdon* without, in his demesne as of fee; and being so seised thereof, he the said *Thomas Walton* the father in his life time, to wit, on the said 4th day of *August* in the said year of our lord 1656, at *London* aforesaid, in the parish and ward aforesaid, by a certain indenture then and there made between the said *Thomas*, by the name of *Thomas Walton* of the parish of *St. Giles's in the Fields* in the county of *Middlesex*, citizen and sadler of *London*, of the one part, and the said *Jasper*, by the name of *Jasper Waterhouse* of *Staple Inn Holborn*, in the said county, gent. of the other part, (which other part of the said indenture, sealed with the seal of the said *Jasper*, the said *Thomas* the son brings here into court, the date whereof is the same day and year aforesaid,) did demise, grant and to farm let to the said *Jasper Waterhouse* the dwelling-house aforesaid with the appurtenances, by the name of all that dwelling-house or tenement then lately built in a common alley leading from *Fetter lane* to *Shoe-lane*, and adjoining to certain rents belonging to the company of *Goldsmiths* within the city of *London*, situate and being in the parish of *St. Bride,*

Bride, otherwise *Bridget*, *London*, abutting on the west upon another tenement belonging to the said *Thomas Walton*, in the occupation of *Michael Bennet* gent., on the east on a certain parcel of ground then used for bowling, and on a garden belonging to Mr. *Arthur Ruddle* on the south, and on the street or king's highway on the north, together with the use and occupation of a pump of water in common with the other tenants of the said *Thomas Walton* the father then or theretofore there, and with all and singular rooms, chambers, lights, easements, gardens, areas, yards, ways, passages, waters, water-courses, profits, advantages and appurtenances whatsoever to the said dwelling-house or tenement belonging, or in anywise appertaining: *to have and to hold* the said dwelling-house or tenement, and all and singular the other premises with their and every their appurtenances, to the said *Jasper Waterhouse*, his executors, administrators and assigns, from the feast of St. *Michael* the archangel then next following the date of the same indenture, to the full end and term of 21 years from thence then next following and fully to be complete and ended: *yielding and paying* therefore yearly and every year, during the said term to the said *Thomas Walton*, his heirs and assigns, the yearly rent or sum of 15*l.* of lawful money of *England*, at the four most usual feasts or terms in the year, that is to say, at the feasts of the birth of our Lord, the annunciation of the blessed virgin *Mary*, the nativity of St. *John*ⁿ *Baptist*, and St. *Michael* the Archangel, by even and equal portions; and if it should happen that the said yearly rent of 15*l.* or any part thereof, should be in arrear and unpaid in part or in the whole for the space of 14 days next following after any of the feast days upon which the same ought to be paid as afore said, being lawfully demanded, that then and from thenceforth it should be lawful to and for the said *Thomas Walton* the father, his heirs and assigns wholly to re-enter into the said demised premises or any part thereof in the name of the whole, and the same to re-have, retain, re-possess and enjoy as in his and their first and former estate, and thereafter wholly to expel, put away and amove the said *Jasper Waterhouse*, his executors, administrators and assigns from thence, the said indenture or any thing in the same con-

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fendant to repair.

tained to the contrary thereof in anywise notwithstanding. And the said *Jasper Waterhouse*, for himself, his executors, administrators and assigns, and for every of them, covenanted, promised and granted to and with the said *Thomas Walton* the father, his heirs and assigns, by the said indenture, in manner and form following, that is to say, that he the said *Jasper Waterhouse*, his executors, administrators and assigns, or some or one of them, at his, or their, or some of their, own proper costs and charges, should well and sufficiently repair, support, uphold, maintain, amend and keep, and against wind and tempest make defensible, the said dwelling-house, or tenement, and all other the premises granted by the indenture aforesaid, in, by, and with all, and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need should be or require during the term so demised by the indenture aforesaid; and would also, at his and their like costs and charges, pave, repair, scour, cleanse and amend all and singular the pavements, widraughts, sewers, sinks and gutters, of and belonging to the said demised tenement, as well within the said dwelling-house, as without in the street, and the pales before the door, together with the brick-wall in the yard or back side adjoining the said bowling there, when and as often as need should be or require, and would at the end of the said term of 21 years, or other sooner determination of the said indenture, which should first happen, peaceably and quietly leave, surrender and yield up the premises aforesaid, so well and sufficiently repaired, supported, paved, scoured and cleansed in every particular, and all the glass and glass-windows, with the shutters thereof, well and sufficiently glazed and amended, together with all such sheds and partitions as should then afterwards be erected and built on any part of the premises demised by the indenture aforesaid, as by the said indenture (among other things) more fully and at large appears; by virtue of which said demise the said *Jasper* entered into the said dwelling-house with the appurtenances and was thereof possessed, the reversion thereof belonging to the said *Thomas Walton* the father and his heirs; and he the said *Jasper* being so as aforesaid possessed of the said dwelling-house with the ap-
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purtenances, and the said *Thomas Walton* the father being seised of the reversion of the dwelling-house aforesaid in his demesne as of fee, he the said *Thomas Walton* the father afterwards, to wit, on the 17th day of *September* in the 20th year of the reign of our said lord the now king, at *London* aforesaid, in the parish and ward aforesaid, died so as aforesaid seised of the reversion of and in the said dwelling-house with the appurtenances; after whose decease the reversion of the said dwelling-house with the appurtenances descended to the said *Thomas* the son, as son and heir of the said *Thomas* the father, whereby the said *Thomas* the son was seised of the reversion of the said dwelling-house with the appurtenances in his demesne as of (1) fee. And the said *Thomas* the

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(1) Although it be a general rule that, where there is a lease by indenture, the lessee is estopped from alleging that the lessor had no interest in the demised premises, during the joint lives of lessor and lessee; yet if in truth the lessor was only tenant for life, the lessee is not prevented from saying so in answer to an action of covenant brought against him by the heir of the lessor after his death. As where covenant was brought upon a lease for years by plaintiff as heir in reversion in fee to his father, and breach assigned for want of repairs, the defendant pleaded that the father when he made the lease to him was only tenant for life, and the father being dead the lease determined, and traversed that the reversion belonged to the father in fee, and on demurrer the plea was held good; and it was said, that the defendant might either traverse that the father was seised of the reversion in fee, or that it descended to the plaintiff.

2 Will. 143. *Brudnell v. Roberts*. And upon the same principle it seems that the lessee is not estopped from shewing that the lessor was only seised in right of his wife for her life, and that she died before the covenant was broken. 8 Term Rep. 487. *Blake v. Foster*. In these cases an interest passed to the lessee at first by the lease, and therefore the lessee is not estopped from shewing the facts which afterwards determined the lease. 6 Rep. 15. a. *Treport's case*. In *England v. Slade*, 4 Term Rep. 682. a person who once stood in the relation of tenant from year to year to the lessor of the plaintiff, but held over after a notice to quit, was permitted to prove that his late landlord (the lessor of the plaintiff) had no title to the premises at the time of bringing the ejectment. There a lessee for 21 years, which expired at *Lady-day* 1791, underlet to the defendant the premises from *Christmas* 1789 to *Christmas* 1790,

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the son in fact says, that he the said *Thomas* the son being for as aforesaid seised of the reversion of the aforesaid dwelling-house with the appurtenances, and the said *Jasper Waterhouse* being so as aforesaid possessed of the said dwelling-house with the appurtenances, afterwards, to wit, on the 29th day of *September* in the 20th year aforesaid, the said dwelling-house with the appurtenances was wholly faken down and ruinous, and the said *Jasper* did not sufficiently repair, support, uphold or maintain the dwelling-house aforesaid with the

1790, who held on and had a regular notice to quit at *Christmas* 1791. On his refusal to quit the landlord brought an ejectment, and the defendant shewed the expiration of the lessor of the plaintiff's title as already mentioned. See 4 Rep. 54. *Rawlyn's case*.

By the before cited cases of *Brudenell v. Roberts*, and *Blake v. Foster*, it appears, that it is not essential that the grantor should convey the real interest only which he has in the estate: for if he grant a larger interest than he is intitled to, still as some interest passes by the conveyance, though it be for a shorter period than he intended, and the conveyance professes to grant, it is sufficient, and will prevent an estoppel for a longer period than the legal duration of the estate so granted. Therefore if tenant for life by lease and release conveys to trustees to the use of himself for life, remainder to A. for life, remainder to B. in fee, and die, and B. bring an action of waste against A. he may shew that the grantor was only tenant for life, and upon his death the limitations in the conveyance determined: Here some interest passed by it to A. and to B. as well as to the tenant for life; for if the tenant for life should commit

a forfeiture of his estate, B. might enter and hold the estate during the life of tenant for life; and so might B. or his heir, if A. should after his entry commit a forfeiture, or die, in the life of tenant for life. But where the grantor or lessor has nothing in the lands at the time of the grant or lease, and therefore no interest passes out of him to the grantee or lessee by the grant, or lease; but the title begins by the estoppel which the deed creates between the parties, such estoppel runs with the land, into whose hands soever it comes, whether heir or assignee. As if a man makes a lease of D. by deed, in which he has nothing, and afterwards purchases D. in fee, and suffers it to descend to his heir, or conveys it away to A. in fee, the heir, or assignee shall be bound by this estoppel, and so shall the lessee and his assignees. 1 Salk. 276. *Trevivan v. Lawrence* 6 Mod. 258. 1 Ld. Laym. 729. See also 2 Ld. Raym. 1550. *Palmer v. Ekins*. 2 Str. 817. S. C. 1 Roll. Abr. 871. (N.) pl. 2. 5. 4 Rep. 54. a. *Rawlin's case*. 3 Leon. 203. Co. Litt. 47. b. and 48. a. And this distinction seems to reconcile all the cases.

appurtenances with needful and necessary reparations and amendment; but on the same day and year last aforesaid, and continually from thenceforth hitherto permitted the aforesaid dwelling-house with the appurtenances, to be and remain wholly ruinous and fallen down against the form and effect of the covenant aforesaid of the said *Jasper* in that behalf. And so the said *Thomas* the son saith, that the said *Jasper*, (although often requested &c.) hath not kept his said covenant in that behalf with the said *Thomas* the son, but hath broken the same, and to keep the same with him hath hitherto altogether refused and still doth refuse, to the damage of the said *Thomas* the son of 300l., and therefore he brings suit &c.

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And the said *Jasper* in his proper person comes and defends the wrong and injury when &c., and says that the said *Thomas Walton* ought not to have his aforesaid action against him, because he says, that after the demise of the aforesaid dwelling-house with the appurtenances in form aforesaid made to the said *Jasper* by the said *Thomas Walton* the father, and before the said dwelling-house was fallen down and ruinous, to wit, on the 27th day of *March* in the 17th year of the reign of our said lord the now king, at *London* aforesaid in the parish and ward aforesaid, he the said *Jasper* granted and assigned to one *George Johnson* gent. his executors, administrators and assigns, the aforesaid dwelling-house with the appurtenances, and all the estate, right, title and term of years of him the said *Jasper Waterhouse*, of and in the same, then to come and unexpired; by virtue of which said grant and assignment, he the said *George Johnson* entered into the said dwelling-house with the appurtenances and was possessed thereof, and being so possessed thereof the said *Jasper* further says that the dwelling-house aforesaid with the appurtenances was afterwards burnt, destroyed and wholly demolished by a great fire, which burnt and consumed the greatest part of the city of *London*, and that in a convenient time after the destruction of the aforesaid dwelling-house and before the exhibiting of the bill of the said *Thomas Walton*, to wit, on the 1st day of *April* in the 21st year of the reign of our said lord

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the now king, the dwelling-house aforesaid, with the appurtenances, was well and sufficiently rebuilt, repaired, supported, upheld and maintained, with needful and necessary reparations and amendments, and still is in good and sufficient repair, according to the form and effect of the indepture aforesaid: and this he is ready to verify; wherefore he prays judgment if the said *Thomas Walton* ought to have his aforesaid action thereof against him &c.

Edmd. Saunders.

Special demur-
rer.

Demurrer in the usual form; and then the following causes of demurrer are assigned. And for causes of demurrer in law upon the said plea, he the said *Thomas* according to the form of the statute in such case lately made and provided sets forth and shews to the court the causes following, that is to say, for that the said *Jasper* does not say by whom the said dwelling-house was rebuilt, nor does he shew by his plea within what *certain* time the said dwelling-house was rebuilt after it was burnt down, so that the court of our said lord the king here might judge whether it was rebuilt in a reasonable and convenient time, and because the aforesaid plea is uncertain, a negative pregnant and wants form.

W. Jones.

Curia advisare
vult.

Joinder in demurrer.

But because the said court of our said lord the king here is not yet advised what judgment to give of and upon the premises, a day thereof is given to the parties aforesaid before our said lord the king at *Westminster* until day next after to hear their judgment thereupon, because the said court of our said lord the king here is not yet advised thereof &c.

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Pasch. 24 Car. 2. Regis. Rot. 180.

COVENANT. The plaintiff declares that *Thomas Walton* his father was seised of a dwelling-house with the appurtenances in the parish of St. *Brides*, otherwise *Bridgets*, *London*, in his demesne as of fee; and being so seised, by indenture (brought into Court) demised to the defendant the said dwelling-house with the appurtenances, *habendum* for the term of 21 years. And the defendant covenanted by the said indenture that he would sufficiently repair, support, uphold, maintain, amend and keep the said dwelling-house with the appurtenances in good and sufficient repair as often as occasion should require; and that by force of the said demise the defendant entered, and was thereof possessed; and he being so possessed, and the plaintiff's father being seised of the reversion thereof in his demesne as of fee, the father died, and the reversion descended to the plaintiff as son and heir of his father, who was seised of the said reversion in his demesne as of fee, and he being so seised, and the defendant being possessed of the said messuage for the term aforesaid "afterwards, to wit, on the 29th day of *September* in the 20th year of the reign of the now king, the said dwelling-house with the appurtenances was wholly fallen down and ruinous, and that the said *Jasper Waterhouse* (the defendant) did not sufficiently repair, support, uphold or maintain the said dwelling-house with the appurtenances with necessary reparations and amendments, but permitted the said dwelling-house with the appurtenances, on the day and year last aforesaid and continually hitherto, to be and remain wholly ruinous and fallen down, against the form and effect of the covenant of the said defendant in that behalf, to the plaintiff's damage &c. wherefore he brought this action."

S. C. 3 Keb. 49
If in covenant for not repairing a house, the defendant pleads that the house was burnt, but rebuilt and repaired before the action, the plea is bad, unless it shews *by whom* it was rebuilt and repaired.

The defendant pleaded in bar of the action, that "after

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the demise of the said dwelling-house with the appurtenances in form aforesaid by the said *Thomas Walton* the father to the said *Jasper*, and before the said dwelling-house was fallen down and ruinous, to wit, on the 27th day of *March* in the 17th year of the reign of our said lord the now king, at *London* aforesaid in the parish and ward aforesaid, the said *Jasper* granted and assigned to one *George Johnson* gent. his executors, administrators and assigns the aforesaid dwelling-house with the appurtenances, and all the estate, right, title and term of years of him the said *Jasper Waterhouse*, of and in the same, then to come and unexpired: by virtue of which said grant and assignment he the said *George Johnson* entered into the said dwelling-house with the appurtenances and was possessed thereof; and being so possessed thereof, the said *Jasper* further saith that the said dwelling-house with the appurtenances was afterwards burnt, destroyed and wholly demolished by a great fire which burnt and consumed the greatest part of the city of *London*; and that in a convenient time after the destruction of the said dwelling-house, and before the exhibiting of the bill of the said *Thomas Walton* (the now plaintiff), to wit, on the 1st day of *April* in the 21st year of the reign of our said lord the now king, the said dwelling-house with the appurtenances was well and sufficiently rebuilt, repaired, supported, upheld and maintained with needful and necessary repairs and amendments, and yet is in good and sufficient repair, according to the form and effect of the said indenture. And this &c. wherefore &c. Upon which the plaintiff demurred specially, and shewed for cause, that the defendant does not say *by whom* the said dwelling-house was rebuilt.

And *Saunders* for the defendant argued, that there was no necessity for the defendant to shew by whom the dwelling-house was rebuilt: First, because it does not well lie in the knowledge of the defendant, who had rebuilt it, he having a long time before the destruction of the dwelling-house assigned all his interest over to *Johnson*, as appears by the plea. Secondly, it was not material to the plaintiff who had repaired and rebuilt the dwelling-house; for whoever has repaired it, the plaintiff derives the same benefit from it, as if the defendant

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ant himself had repaired and rebuilt it. Thirdly, if any stranger had entered and rebuilt the dwelling-house, the defendant could not therefore rebuild it, it being already done to his hand, and yet the plaintiff has not had any loss by it; and therefore it was unreasonable that the plaintiff should recover any damages against the defendant, who had not done any wrong, nor could prevent another from rebuilding the dwelling-house, because he had assigned over all his interest before, and so could not enter and rebuild it himself. Fourthly, as to the objection, that perhaps the plaintiff himself had repaired and rebuilt the said dwelling-house, (and so was the truth of the case,) he said that should not be intended; for although it is not said in the plea, that the defendant repaired the dwelling-house, yet it would be too foreign an intendment that the plaintiff himself had repaired it; for if it had been so done, it would have been of his own wrong, for during the term the plaintiff himself ought not to have intermeddled with the possession, and therefore as the case appeared on the record, that could not be well intended; but if the truth had been so, the plaintiff ought to have replied it, and not to have demurred upon the plea.

But *Hale* chief-justice would not hear these reasons; but the other side alleging that the plaintiff himself had repaired the dwelling-house, and could have no proportion of the expences of it, he said that the plaintiff having shewed the afore-said cause of his demurrer specially, and the defendant refusing to amend his plea as he ought before the demurrer was joined, but had pleaded so on purpose to trick the plaintiff, he gave judgment for the plaintiff immediately (*quasi* in a passion), and a writ of inquiry was awarded; but in my opinion without any consideration of the matter in law (2), whether the plea was sufficient or not.

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(2) See however 1 Vent. 38. *Anon.* where *Twyfden* justice held that the defendant ought to shew by whom the house was repaired, for otherwise it might be intended that the plaintiff himself had repaired it; and although

Kelynge C. J. and *Rainsford* justice were of a contrary opinion, yet the case was adjourned.

In this case the covenant was to repair generally; and no defence is attempted to be made upon the ground that

that the house was burnt by accident. Indeed if such an attempt had been made, it would have been of no use, because the established principles of law upon the subject are clear that the lessee would have been bound to rebuild the house, notwithstanding the accident; the distinction being between a duty created by law, and one created by the party. For when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him: as in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused; so in escape, if a prison be destroyed by tempest or enemies, the gaoler is excused. 33 H. 6. 1.: but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if a lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he is bound to repair it. Bro. Covenant 4. All. 27. *Paradine v. Jane*. Dy. 33. a. pl. 10. So where in covenant for not keeping a bridge in repair, the defendant pleaded that the bridge was by the act of God, by a great and extraordinary flood of water such as the bridge could not resist, without the default of the defendant, washed, broken and fell down; this plea was on demurrer adjudged to be insufficient. 6 Term Rep. 750. *The Company of Brecknock Navigation v. Pritchard*. So where in covenant against tenant for life under a marriage-settlement, who had covenanted to re-

pair the house during his life and so leave the same at his death, the defendant pleaded that three fourth-parts of the house was burnt down, and that he repaired it until it was burnt, and had repaired the residue that was not burnt. On demurrer to this plea, the court was of opinion that it contained no answer whatever to the declaration; for the defendant having covenanted to repair without any exception, it imported, that he should at all events repair the house, and, in case it were burnt, or fell down, should rebuild it. Com. Rep. 627. *Earl of Chesterfield v. Duke of Bolton*. And the same point precisely was determined in the case of *Bullock v. Dommitt*. 6 Term Rep. 650. on the authority of the last mentioned case. See Vol. 11 322. a. note (7).

It was this liability of the tenant to rebuild, notwithstanding the house should be burnt down by accident, or blown down by tempest, that in all probability occasioned an exception, now frequently introduced in leases, of casualties by fire, and sometimes by wind and tempest. But even then the lessee is bound to pay the rent during the term, although the house should be burnt or blown down, if there be an express covenant for payment of the rent, for the same reason and upon the same principles that he is bound to rebuild, namely, because he has bound himself by an express covenant to pay the rent. And as it appears by the before-mentioned case of *Paradine v. Jane*. All. 26. that it is no plea in such case, to an action of covenant for non-payment of the rent, to say, that the house was destroyed by the king's enemies, or that the defendant was evicted

evicted and turned out of possession by them, so it is equally no answer to say that the house was burnt or blown down, and therefore he is not bound to pay the rent. Thus in covenant for non-payment of rent reserved by a lease in which the lessee covenanted to pay the rent and also to repair, except the premises should be demolished or damaged by fire, the defendant pleaded that before the rent became due, the premises were burnt down against his will, and that they were not rebuilt by the plaintiff during the whole time for which the rent was demanded, nor had he any enjoyment of the premises; but on demurrer, the plea was held ill on the authority of the last-cited case in All. 27.; for that whatever might be the default of the plaintiff in not repairing, yet the defendant must in all events perform his covenant to pay the rent. 2 Ld. Raym. 1477. *Monk*

v. Cooper. 2 Str. 763. S. C. And expressly the same point was afterwards determined upon the authority of the last-cited case, in 1 Term Rep. 310. *Belfour v. Weston.* S. C. cited Ibid. 710. And it seems the lessor is not bound to rebuild, though he may insist upon the payment of the rent during the whole term. *Pindar v. Ainsley*, cited 1 Term Rep. 312. *Belfour v. Weston.* 6 Term Rep. 488. *Weigall v. Waters.* However it is said, that if the landlord refuses to rebuild, and yet brings an action of covenant for the rent, a court of equity will grant an injunction to prevent his enforcing payment until he has rebuilt the premises. Ambl. 619. *Brown v. Quilter*, and *Steele v. Wright*, cited 1 Term Rep. 708. *Doe v. Sandham.* But see 3 Anstr. 687. *Hare v. Grove*, and 2 Anstr. 575. *Waters v. Weigall.*

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Case 70.

EJECTMENT on a lease made by Sir *William Monckton*, and Sir *William Wentworth* knts. on a trial at bar, it was ruled by the court on evidence, that where one *William Savile* was tenant in tail of divers copyhold lands in the manor of *Wakefield* in the county of *York*, and made a voluntary lease for 21 years, without license of the lord, to commit a forfeiture, which lease was presented in the copyhold court, and the lands seised into the hands of the lord according to the custom of the manor, and *Savile* appointed the forfeiture to be for the benefit of one *Arthur Savile* and his heirs, and it being proved that there was a custom to commit such forfeitures

A custom to bar an intail of a copyhold by forfeiture, and regrant is good; and in such case the lord cannot admit any other than the person for whose benefit the forfeiture was intended; and if he do, a purchaser may avoid all mesne acts, when he is admitted, as well as upon a surrender.

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feitures on purpose to bar (1) the intails of copyhold; and to transfer the lands over to any other person; although *Arthur Savile* was not admitted by the lord in the lifetime of *William Savile*, but after his death the lessors of the plaintiff were admitted by the lord; and although the lord afterwards sold the manor to *Sir Christopher Chapman*, who afterwards admitted *Arthur Savile* (the lessors of the plaintiff being admitted before), yet *Arthur* by his admission had a good

(1) This custom of barring the intails of copyholds by forfeiture and regrant is peculiar to the manor of *Wakefield*; but it is held a good custom, 1st Sid. 314. *Pilkington v. Stanhop*, 2 Keb. 127. S. C. and the custom there goes further still, that tenant in tail may surrender to a purchaser in fee, and he shall commit the like forfeiture to bar the intail without joining the tenant in tail. Ibid. However it should seem that if there was a custom in any other manor of barring an intail of a copyhold by forfeiture and regrant, it would be good; for what is a good custom in one manor must necessarily be so in another: though the validity of this custom has been questioned. Sty. 450. *Pilkington v. Bagshaw*. 2 Vef. 606. *Carr v. Singer*. An intail of a copyhold may also by custom be barred by a common recovery suffered in the lord's court; but it seems it is no bar without such a custom. Moor. 637. *Church v. Wyat*. Cro. Eliz. 380. *Eylet v. Lane*. Ibid. 391. *Clun v. Pease*. Sir T. Raym. 162. *Snow v. Culler*. 1 Lev. 136. S. C. 2 Vef. 606. *Carr v. Singer*; though it is said in 1 Roll. Abr. 506. (B.) pl. 2. *Dell v. Higdon*, that a recovery will be a bar without a custom, but a *dubitatur* is added. S. C. Moor.

358. Cro. Eliz. 372. 4 Rep. 23. a. pl. 3. and *Willes* C. J. was of this opinion against that of the three other judges in the above cited case of *Carr v. Singer*. So the intail of a copyhold may by custom be barred by surrender. Co. Litt. 60 b. 2 Burr. 979. *Martin v. Mowlin*. And a custom to bar by surrender may subsist in the same manor concurrently with a custom to bar by recovery; for there is nothing more unreasonable in allowing two ways of alienating an intail of a copyhold by surrender and recovery, than there is of allowing two ways of alienating an intail of a freehold by fine and recovery. 2 Str. 1197. *Everall v. Smalley*. 1 Wilf. 26. S. C. 2 Black. Rep. 944. *Doë v. Truby*. And as a custom of intailing copyhold estates would create a perpetuity, unless there was some means devised to bar them, it has been adjudged, that where there is no custom to bar the intail by recovery, it may be barred either by a common surrender, or even a surrender to the use of a will. 2 Vef. 606. *Carr v. Singer*, by three judges against the opinion of *Willes* C. J. who thought a recovery was the proper method of barring the intail. See *Watk. Copyholds* 178.

title against the lessors of the plaintiff, and the forfeiture was only in the nature of a surrender, or a common recovery, and the lord could not admit any other than him to whom it was limited by the tenant so making such forfeiture; but *cestui que use* (a) after his admission shall have it, and the lord cannot otherwise dispose of it: and wherever *cestui que use* is admitted he shall avoid all mesne acts or dispositions made by the lord, as he should if a surrender hath been made to his use, and he had afterwards been admitted according to the surrender (2).

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(a) Not strictly
cestui que use.
1 P. Will. 17.
1 L. Raym. 627.
2 Vef. 257.
1 Brownl. 127.
Watk. Copyhold
99.

(2) For the admission relates to the surrender, and the surrenderee's title begins from the date of it. Therefore where a copyholder in fee surrendered to the use of another, and died before the surrenderee was admitted, it was held that his admission afterwards should relate to the surrender, and defeat the copyholder's wife of her free-bench; for though he died *seised* in fee, yet it was of a defeasible, and not an absolute estate. 1 Salk. 185. *Benson v. Scot*. Carth. 275. 3 Lev. 385. S. C. So if one joint-tenant surrenders to the use of his will, his devisee shall take; for the joint tenancy would be severed from the time of the surrender. Cro. Jac. 100. *Porter v. Porter*. Co. Litt. 59. b. 1 Brownl. 127. *Allen v. Nesb*. And after the surrenderee has been admitted, he may lay his demise in an ejectment to recover the copyhold premises on the day of the surrender, or any day between that and the admission. 1 Term Rep. 600. *Holdfast v. Clapham*: and consequently may recover the mesne profits from the time of the surrender. 2 Will. 15. *Roe v. Hicks*. But the surrenderee cannot forfeit for felony be-

fore admission: 2 Will. 13. *Roe v. Jeffreys*. • Until admission the estate is clearly in the surrenderor and the surrenderee, whether vendee, devisee, or mortgagee, has no manner of right *at law*, either to take the profits or bring an ejectment, *until admission*. 1 Freem. 496. *King v. Dillington*. See 1 Mod. 120. per Hale C. J. 2 Will. 402. *Holder v. Preston*. And on the other hand, if the surrenderee *dies* before admission, his heir is intitled to be admitted; and when he is so, he is in by *descent*, and the widow of the surrenderee shall have her free-bench. For the surrender is the substantial part of the contract, and a complete execution of it as between the vendor and the vendee; though not until admission as between the surrenderee and the lord; for the admission is material to him in order that he may be paid his fine. 5 Burr. 2761. 2785. *Faughan v. Atkins*. It has been holden, that a custom in a manor that the grantee of a customary estate, which will pass either by surrender or deed and admission, and must be admitted *during the life of the grantor*, is good. Willes's Rep. 430. *Fenn v. Mariott*.

Case 71.

Leigh *versus* Chapman.

An occupier of land within a hundred, is an *inhabitant* within the statutes of hue and cry, although he has neither a house, nor lodges there.

TROVER and conversion for two geldings brought by *Leigh* secondary of one of the counters in *London* plaintiff, against the defendant *Chapman* being under-sheriff of the county of *Bucks*. On not guilty pleaded, on the trial at *nisi prius* at *Westminster* before *Hale* chief-justice, the case on the evidence was such: That there was a judgment on the statute of hue and cry recovered against the hundred of *Stoke-poges* in *Bucks*, and a *fieri facias* was awarded against them; and the plaintiff *Leigh* was seised of lands within the same hundred to a considerable value, which he occupied and held in his own hands, but had neither a house within the hundred nor did he ever lodge there. And he was assessed to 10*l*. for his proportion of the payment of the money recovered by the judgment: and because he refused to pay it, the defendant, as under-sheriff, took the two geldings in execution by virtue of the said *fieri facias*; upon which the plaintiff brought this action.

And it was ruled by *Hale* chief-justice clearly, that the plaintiff was liable to pay his proportion, although he never lodged within the hundred: (wherefore he could not watch nor ward, and consequently was not chargeable to the robbery, as was pretended): for as long as he held lands in his hands, so long would he be chargeable to robberies within the hundred, and be said to be an *inhabitant* within the hundred within the statutes of hue and cry: (which was the matter controverted by the plaintiff): for otherwise it might happen that no one would be chargeable: as if several persons held all the lands within the hundred in their hands, but their dwelling-houses were in another hundred adjoining; if they should by that means be discharged, the party robbed would not have any remedy, but the statute would be wholly
cluded;

(1) eluded; and thereupon by the defendant's consent a juror was withdrawn: but the plaintiff had paid the 10l. assessed upon him before, in order to have his geldings again, and also the charges of the keep of them before he redeemed them.*

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CHAPMAN

(1) For the proceedings against the hundred on the statute of hue and cry, see *ante*, p. 374. *Pinkney v. Inhabitants of East Hundred*. By statute 27 Eliz. c. 13. f. 5, it is enacted, "That after execution of damages, by the party robbed, had, it shall be lawful, upon complaint made by the party so charged, to and for two justices of the peace of the same county inhabiting within the said hundred, or near to the same, where any such execution shall be had, to assess and tax rateably and proportionably, according to their discretions, all and every the towns, parishes, villages and hamlets, as well of the said hundred where any such robbery shall be committed as of the liberties within the said hundred, to and towards an equal contribution to be had and made for the relief of the inhabitant against whom the party robbed before that time had his execution; and that after such taxation made, the constable or headborough of every such town, parish, village and hamlet, shall have full power and authority within their several limits, rateably and proportionably to tax and assess according to their abilities, *every inhabitant and dweller* in every such town, parish, village and hamlet, for and towards the payment of such taxation and assessment, as shall be so made upon every such town, parish,

village and hamlet as aforesaid by the said justices; and that if any inhabitant of any such town, parish, village or hamlet shall refuse to pay the said taxation and assessment, it shall be lawful for the said constable and headborough within their several limits and jurisdictions, to distrain every person so refusing, by his goods and chattels, and the same distress to sell, and the money thereof coming to retain to the use aforesaid, and to return the surplus, if any, to the person so distrained." We have already seen, that by statute 8 Geo. 2. c. 16. f. 4 process shall no longer be served, in an action on the statute of hue and cry, *on any inhabitant*, but only on the *high constable*, of the hundred: *ante*, 377. note (11). It was therefore necessary to alter so much of the statute of 27 Eliz. as related to the relief of the inhabitant against whom execution used formerly to be levied, and to direct the mode in which judgments against the hundred should in future be executed upon the statute of hue and cry: and to that end it is enacted by the same statute 8 Geo. 2. c. 16. f. 4. "That in case the plaintiff shall recover judgment, no execution shall be served on any particular inhabitant of the hundred, nor on the high constable; but the sheriff or his officer shall, upon the receipt of any writ of execution, instead of serving it on any inhabitant,

“inhabitant, cause the same to be pro-
 “duced gratis unto two justices resid-
 “ing within the said hundred, or near
 “unto the same, who shall thereupon,
 “with all convenient speed, cause such
 “taxation and assessment to be made,
 “and to be levied and collected, in such
 “manner as is prescribed in and by the
 “statute 27 Eliz., in which taxation
 “and assessment there shall be included,
 “over and above what the costs and
 “damages recovered shall amount to,
 “all such just and necessary expences
 “which any high constable hath been,
 “or shall be at, in having defended any
 “such action, claim being made there-
 “to by him before the said justices,
 “upon notice being given him by the
 “said justices for that purpose; and
 “the said sums of money so to be
 “levied and collected shall be paid over,
 “by the officer who is to collect the
 “same by the said statute of Elizabeth,
 “within ten days after such collection,
 “to the sheriff of the county wherein
 “the robbery shall happen, to the use
 “of the plaintiff, for so much as the
 “costs and damages recovered shall
 “amount to, and to the use of the high
 “constable for so much as his ex-
 “pences in defending the action shall
 “amount to, of which the high con-
 “stable shall give in an account upon
 “oath, to the satisfaction of the jus-
 “tices, who are required to administer
 “such oath, and shall in such expences
 “have no further allowance towards
 “paying an attorney to defend the
 “action, than what such attorney’s bill
 “shall be taxed at by the proper offi-
 “cer of the court where the action
 “shall be brought.” And by statute
 22 Geo. 2. c. 46. s. 34. which relates

relates principally to the riot act and
 black-act, see *ante*, 377. note (12), it
 is enacted, “That no writ of execution
 “thereafter to be sued out against the
 “inhabitants of any hundred on any
 “judgment obtained by virtue of any
 “act of parliament whatsoever, shall be
 “levied on any particular inhabitant of
 “such hundred; but the sheriff shall,
 “on receipt of every such writ, cause
 “the same to be produced to two jus-
 “tices, in such manner as is directed by
 “the last-recited clause of the 8 Geo. 2.
 “c. 16.: and that thereupon the said
 “justices shall, in the manner directed
 “by the said act, cause a taxation to
 “be made, levied and collected, for
 “raising and paying, as well the costs
 “and damages recovered, as also all
 “such just expences as any inhabitant
 “shall have been at in defending such
 “action; the same being first proved
 “on oath, and the attorney’s bill first
 “taxed as the act directs; and the sums
 “of money so to be levied and collect-
 “ed, shall within the time by the said
 “act limited, be paid to the sheriff,
 “and by him paid over to the persons
 “intitled to receive the same, without
 “any deduction.”

Upon the last-recited act, it seems
 that a writ of execution sued out by
 the party who has recovered damages
 against the hundred upon the riot act,
 and delivered by the sheriff to the jus-
 tices, is a good foundation for an order
 to levy the amount. But the order of
 the justices in such case directing the
 money when levied to be paid into the
 hands of a banker, subject to their fur-
 ther order, is bad; being not warranted
 by the act, which requires payment to
 the party entitled. It seems also, that

the order for levying the damages ought to be upon the inhabitants of the "*towns, parishes, villages and hamlets,*" pursuant to the statute 27 Eliz., and not upon the inhabitants of the "*dis- tricts and parishes*" within the hundred. 5 Term Rep. 341. *King v. Inhabitants of the Hundred of Halfshire.*

The construction above put by Lord Hale, on the word "*inhabitant,*" in the statute 27 Eliz., is agreeable to that which Lord Coke gives to the same word, in the statute of bridges, 22 H. 8. c. 5. who says, that if a man has lands or tenements in his own possession and manurance in the county &c. where the decayed bridge is, although he dwells in another county &c. yet he is an *inhabitant* within that statute, both where his person dwells. and where he has lands in his own possession. 2 Inst. 702. See also 5 Rep. 66. b. *Jeffrey's* case as to a church-rate. And Lord Hale's construction of this same statute 27 Eliz. was also adopted in a modern

case, which was much debated and considered; in which it was adjudged, that all persons, having personal property within the parish assessed, are *inhabitants* within the statute 27 Eliz. In the case alluded to, the company of proprietors of the *London* bridge water-works, whose profits amounted to 2500l. a year, but who had only their offices with the wheels and works for raising the water, a wharf, a secretary's house, and fire engine, locally situated in the ward in which they had been assessed, and who also only collected 276l. a-year out of the 2500l. in such ward, were finally adjudged in the exchequer chamber, (the court of king's bench having been equally divided,) to be *inhabitants* of the said ward within the 27 Eliz., on the authority of Lord Hale in the principal case, and Lord Coke in his said commentary on the statute of bridges, and to be rateable there to the whole amount of the said sum of 2500l. Cald. 315. *Atkins v. Davis.*

